

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**

AIR FORCE INSTRUCTION 51-110

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Law

**PROFESSIONAL RESPONSIBILITY
PROGRAM**

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This is a new publication implementing Air Force Policy Directive (AFPD) 51-1, *The Judge Advocate General's Department*, and Rule for Court Martial (RCM) 109. It provides guidance for the maintenance of professional responsibility and ethical standards within the Air Force Judge Advocate General's Corps (AFJAGC). This publication applies to AFJAGC members, including Air Reserve Component members.

Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of Publication*; route AF Forms 847 from the field through appropriate functional's chain of command.

The authorities to waive wing/unit level requirements in this publication are identified with a Tier ("T-0, T-1, T-2, T-3") number following the compliance statement. See AFI 33-360, *Publications and Forms Management*, Table 1.1 for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternately, to the Publication OPR for non-tiered compliance items. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule located in the Air Force Records Information Management System (AFRIMS). This publication may be supplemented at any level, but all supplements must be routed to OPR for coordination prior to certification and approval.

This publication requires the collection and/or maintenance of information protected by the Privacy Act (PA) of 1974. The authorities to collect and/or maintain the records prescribed in this publication are *Title 10 United States Code*, Section 8037 and RCM 109, Manual for Courts-

Martial (MCM). The applicable Privacy Act System Notice, F051 AFJA E, *Judge Advocate General's Professional Conduct Files*, is available online at: [http://dpclo.defense.gov/Privacy/DODComponentArticleList/tabid/6799/Category/](http://dpclo.defense.gov/Privacy/DODComponentArticleList/tabid/6799/Category/277/departments-of-the-air-force.aspx)

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1. Overview. This instruction provides guidance governing the ethical conduct of AFJAGC members. It sets forth the Air Force Rules of Professional Conduct (AFRPC) (Attachment 2), the Air Force Standards for Civility in Professional Conduct (Attachment 3), Supplemental Rules of Professional Conduct for Air Force Reserve Judge Advocates (Attachment 4), and Supplemental Rules of Professional Conduct for Air National Guard Judge Advocates (Attachment 5) (hereinafter rules and standards). References to rules and standards also encompass the Air Force Standards for Criminal Justice, which is found in AFI 51-201, *Administration of Military Justice*, Attachment 3. Additionally, this instruction establishes the procedures for receiving, processing, and taking action on complaints of professional misconduct made against lawyers practicing under the supervision of TJAG. It also provides limitations on

and procedures for processing requests to engage in the outside practice of law by AFJAGC lawyers and for the use of legal services volunteers.

2. Applicability. This instruction applies to all military and civilian lawyers, paralegals, and nonlawyer assistants in the AFJAGC. This includes all active duty, Air Force Reserve, Air National Guard (ANG), and civilian personnel employed by the AFJAGC, civilian counsel who represent an accused or are likely to represent an accused at court-martial or other proceedings governed by the Uniform Code of Military Justice (UCMJ) and/or MCM, and other personnel under the functional supervision of TJAG. The term “lawyer” in each rule should be read as “all military and civilian members of the JAGC.”

2.1. Acts or omissions may constitute professional misconduct, criminal misconduct, poor duty performance, or a combination of all three. Care must be taken to appropriately characterize the nature of the conduct to determine who should take official action.

2.1.1. Questions of legal ethics and professional misconduct by attorneys are within the exclusive province of TJAG. Nothing in this instruction limits the authority of TJAG to 1) issue or withdraw any certification or qualification to act as a military judge, any certification of competency to act as counsel before courts-martial, or any designation as a judge advocate; or 2) suspend any attorney from performing duties pending resolution of an allegation of unprofessional or unethical conduct.

2.1.2. Criminal misconduct is properly addressed by the attorney’s chain of command through the disciplinary process provided under the UCMJ and implementing instructions or through referral to appropriate civil authority. Poor performance of duty is properly addressed by the attorney’s chain of command through various administrative actions, including documentation in performance reports or appraisals. Nothing in this instruction limits the authority of commanders or other supervisors from taking appropriate disciplinary or administrative action when warranted.

3. Responsibilities.

3.1. **TJAG.** TJAG is responsible for making reasonable efforts to ensure all members of the AFJAGC receive training on and act in conformity with the rules and standards contained herein. Consistent with TJAG’s responsibilities to maintain ethical standards in the AFJAGC, TJAG is authorized to conduct inquiries into professional misconduct by AFJAGC attorneys or other attorneys subject to TJAG’s functional supervisory authority pursuant to RCM 109.

3.2. **Deputy Judge Advocate General (DJAG).** DJAG is delegated the authority to conduct initial reviews and appoint inquiry officers on cases in which the subject is a senior supervising attorney (SSA) as defined in paragraph 3.5 and in cases in which the subject attorney does not fall under the supervision of a SSA, including civilian attorneys who are not part of the AFJAGC.

3.3. **TJAG’s Professional Responsibility Administrator (TPRA).** TPRA is assigned to the Administrative Law Directorate (HQ USAF/JAA-PR). TPRA will carry out overall administration and management of TJAG’s Professional Responsibility Program. TPRA reports to TJAG through the Director, Administrative Law, on all professional responsibility matters. TPRA will provide general guidance on professional responsibility matters to AFJAGC members and will refer matters and provide assistance to TJAG’s Advisory

Committee on Professional Responsibility and Standards as appropriate. TPRA will provide monthly case reports to the Director, Administrative Law and Advisory Committee. TPRA will also provide such reports concerning active duty cases to the Professional Development Directorate (HQ USAF/JAX).

3.4. TJAG's Advisory Committee on Professional Responsibility and Standards (Advisory Committee). The Advisory Committee will advise TJAG on matters related to the maintenance of professional responsibility rules and standards.

3.4.1. The Advisory Committee may be convened to take actions required in accordance with this instruction. It will advise TJAG on alleged violations of the rules and standards. Neither the Advisory Committee nor its individual members has investigative powers while performing this function, and neither will communicate directly with the subject, counsel, or witnesses on matters under consideration.

3.4.2. The Advisory Committee may issue advisory opinions on professional responsibility matters consistent with the procedures set forth in paragraph 9.

3.4.3. The permanent members of the Advisory Committee are the Director, USAF Judiciary (AFLOA/JAJ), Director, Civil Law and Litigation (AFLOA/JAC), Director, Civilian Career Development, Plans, and Programs (HQ USAF/JAZ), and the Reserve Advisor to TJAG (HQ USAF/JAR), who will serve only on matters affecting Reserve and ANG judge advocates. TPRA will serve as a non-voting recorder to the Advisory Committee. TJAG may appoint ad hoc members to the Advisory Committee when necessary to provide expertise in a particular area or to replace a member who is unable to serve on a particular case. The senior active duty member on the Advisory Committee will be the chairperson.

3.5. Senior Supervisory Attorney (SSA). SSAs are responsible for making reasonable efforts to ensure attorneys under their supervision receive training and conform to the rules and standards. When SSAs receive information that AFJAGC members under their jurisdiction are alleged to have violated TJAG's rules and standards, SSAs must review and process the alleged violations. SSAs are delegated the authority to appoint inquiry officers to investigate alleged violations of the rules and standards by attorneys under their supervisory authority. For the purposes of this instruction, the term senior supervisory attorney includes the Air Force Legal Operations Agency commander (AFLOA/CC), major command staff judge advocates (SJA) (Air Combat Command SJA, Air Education and Training Command SJA, Air Force Global Strike Command SJA, Air Force Materiel Command SJA, Air Force Special Operations Command SJA, Air Force Space Command SJA, Air Mobility Command SJA, Air Force Reserve Command SJA, Pacific Air Forces SJA, United States Air Forces Europe SJA), and the ANG Assistant to TJAG (for ANG judge advocates).

3.6. Supervisory Attorneys. Supervisory attorneys are responsible for making reasonable efforts to ensure attorneys under their supervision receive training and conform to the rules and standards.

3.6.1. **Organizational Training.** Supervisory attorneys are responsible for ensuring AFJAGC attorneys, paralegals, and non-lawyer assistants under their supervision receive training on the rules and standards as an organization on an annual basis.

3.6.2. Annual Rules Review and Certification. In addition to the organizational training, supervisory attorneys must also ensure AFJAGC members under their supervision individually certify their annual review of the applicable rules and standards.

3.6.3. Additional Certifications. Consistent with AFI 51-103, *Designation and Certification of Judge Advocates*, and AFI 51-107, *Employment of Civilian Attorneys*, supervisory attorneys must also ensure subordinate attorneys annually certify they are an active (or equivalent) member of the bar of the highest court of a state, U.S. commonwealth, U.S. territory, or the District of Columbia and certify the absence of any pending or completed disciplinary proceedings by any licensing authority.

3.6.4. Certifications will be done through the PR CERT online certification program in the Federal Legal Information Through Electronics (FLITE) database.

3.7. All Attorneys. All AFJAGC attorneys are responsible for knowing and complying with the applicable rules and standards and the rules of their respective licensing jurisdictions. AFJAGC attorneys are responsible for completing annual professional responsibility certifications through the PR CERT program as discussed in paragraphs 3.6.2. through 3.6.4. AFJAGC attorneys must also meet ethics training and other professional responsibility requirements imposed by their licensing authorities in order to maintain an active (or equivalent) status.

3.7.1. Reporting Alleged Violations. Allegations of violations of the rules and standards will be reported in accordance with Rule 8.3, Air Force Rules of Professional Conduct (Attachment 2), and this instruction.

3.7.2. Required Notifications.

3.7.2.1. AFJAGC attorneys must notify TPRA prior to contacting the licensing authorities of another AFJAGC attorney regarding an alleged professional responsibility violation by any attorney subject to this instruction. This notification will assist TPRA in carrying out TJAG's supervisory responsibilities and will ensure TJAG is aware of all professional responsibility matters involving attorneys within the AFJAGC.

3.7.2.2. In accordance with AFI 51-103, judge advocates will provide notice through their SJA (or equivalent) and SSA to HQ USAF/JAX of the commencement of any action (including an investigation) by licensing authorities that may affect their license to practice law. ARC judge advocates must report similar actions through their SJA and SSA to the Mobilization Assistant to TJAG or the ANG Assistant to TJAG, as applicable. In accordance with AFI 51-107, civilian attorneys will make such notifications through their SJA (or equivalent) and SSA to the Civilian Career Development, Plans and Programs, Directorate (HQ USAF/JAZ). JAX and JAZ will advise TPRA of all actions by licensing authorities.

3.8. Paralegals and Nonlawyer Assistants. Although paralegals and nonlawyer assistants are not licensed attorneys subject to state licensing authorities, all Air Force legal professionals are responsible for knowing and conducting themselves in a manner consistent with the applicable rules and standards that govern the Air Force practice of the attorneys they assist. The terms paralegal and nonlawyer assistants includes other Air Force personnel, military and civilian, who perform duty in an Air Force legal office in support of Air Force

attorneys. Paralegals and nonlawyer assistants are responsible for completing annual professional responsibility certifications through the PR CERT program as discussed in paragraph 3.6.2. See paragraph 11.2 concerning volunteers.

3.9. Civilian Attorneys. Civilian attorneys who are not AFJAGC attorneys but who represent an accused in courts-martial, other proceedings governed by the UCMJ and/or MCM, or administrative proceedings are responsible for knowing and complying with the applicable rules and standards and the rules of their respective licensing authorities. Military defense counsel must provide associate civilian counsel with a copy of the applicable rules and standards for their review.

3.10. Host Nation Attorneys. The professional responsibility program responsibilities also apply to host nation attorneys who perform duty in an Air Force legal office. Host nation attorneys employed overseas by the Department of the Air Force must follow the rules and standards promulgated in this instruction to the extent the rules and standards are not inconsistent with their domestic law and professional standards.

4. Reporting Alleged Violations of the Rules and Standards.

4.1. Alleged Violations of the Rules and Standards by Judges. All allegations involving professional misconduct by Air Force judges will be reported and handled under the procedures outlined in AFI 51-201, Attachment 6.

4.2. Alleged Violations of the Rules and Standards by Attorneys Who are Not Judges. A complaint should ordinarily be in writing and detail the attorney's actions or omissions that constituted a violation of the rules and standards. A complaint may be initiated by any person.

4.2.1. Complaints of alleged violations of the rules and standards will be reported to:

4.2.1.1. DJAG (through TPRA) when the subject of the professional misconduct allegation is an SSA or an attorney not assigned to an SSA.

4.2.1.2. The subject attorney's SSA as outlined in paragraph 3.5. If an allegation is reported to someone other than the subject's SSA, the allegation will be forwarded to the appropriate SSA. Upon receiving information of a potential violation of the rules and standards, the SSA will notify TPRA. TPRA will monitor the processing of the matter.

4.2.1.2.1. The ANG Assistant to TJAG for complaints concerning ANG judge advocates. Complaints involving ANG judge advocates shall be forwarded to the ANG State Headquarters SJA of the state of the unit to which the subject judge advocate is assigned. The State Headquarters SJA shall notify the appropriate command authorities thereof, and send it, together with such comment as deemed appropriate, to the ANG Assistant to TJAG. If, however, the subject is a State Headquarters judge advocate or an ANG judge advocate in the grade of colonel, the information shall be forwarded directly to the ANG Assistant to TJAG, who will notify the appropriate state command authorities. If the ANG judge advocate is performing duty under Title 10, the complaint may be received and processed by the appropriate active duty SSA.

5. Processing Allegations of a Violation of the Rules and Standards. All allegations of a violation of the rules and standards will be investigated expeditiously and fairly.

5.1. Deferring the Processing of a Complaint. When the alleged violation of the rules and standards involves allegations of criminal misconduct, TJAG, DJAG, or the SSA as appropriate may defer an inquiry or action on the alleged rules and standards violation until criminal allegations are resolved. TJAG, DJAG, or the SSA may also defer inquiries and actions when otherwise warranted (e.g., to prevent interference with an ongoing litigation, post-trial actions, or the appellate process). The TPRA should be informed of any decision to defer the processing of a complaint.

5.2. Processing Cases of Civilian Counsel. The procedures and actions set forth in this instruction regarding allegations of violations of the rules and standards will apply, insofar as practicable, against civilian counsel who are not AFJAGC attorneys, but who represent a military accused. Complaints against civilian counsel who are not AFJAGC attorneys will be forwarded to DJAG.

5.3. Initial Review and Credibility Determination: Senior Attorney Cases. When the subject of an allegation of professional misconduct is a general officer or colonel or holds a civilian grade of GS-15 or higher, the following procedures shall apply.

5.3.1. Initial Review. DJAG or the SSA may forward the complaint to the subject of the complaint and provide the subject an opportunity to provide an initial statement, if the subject desires to do so. After reviewing the complaint and any information from the subject, if provided, DJAG or the SSA will make comments and recommendations and forward the case to TPRA. TPRA will review the case and forward it to the Advisory Committee.

5.3.2. Credibility Determination. The Advisory Committee will review the allegation in light of the evidence gathered to determine whether it appears credible. An allegation is credible if the information received provides a reasonable belief that a rules and standards violation occurred.

5.3.2.1. If upon initial review the Advisory Committee determines that the allegation is not credible and further action is unwarranted, the case will be sent to TJAG with a recommendation that it be closed.

5.3.2.2. If upon initial review the Advisory Committee determines that the allegation appears credible, it will either 1) direct TPRA to return the case to DJAG or the SSA for the appointment of an inquiry officer; or 2) recommend TJAG find that the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.3.2.3. Upon receipt of the Advisory Committee's recommendation following initial review, TJAG may 1) close the case; 2) refer the matter back to DJAG or the SSA for appointment of an inquiry officer; 3) refer the matter back to the Advisory Committee to answer additional questions; or 4) determine the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.4. Initial Review and Credibility Determination: Other Attorney Cases. In cases where the subject of an allegation is a lieutenant colonel or below, a civilian in the grade of

GS-14 or below, or a civilian counsel who represents an accused at a court-martial or other proceeding governed by the UCMJ and/or MCM, the following procedures shall apply.

5.4.1. Initial Review. DJAG or the SSA may forward the complaint to the subject of the complaint and provide the subject an opportunity to provide an initial statement, if the subject desires to do so.

5.4.2. Credibility Determination. After reviewing the complaint and any information from the subject, if provided, DJAG or the SSA will assess the credibility of the complaint. DJAG or the SSA will review the allegation in light of the evidence gathered to determine whether it appears credible. An allegation is credible if the information received provides a reasonable belief that a rules and standards violation occurred.

5.4.2.1. Allegation is Not Credible. If, upon initial review, DJAG or the SSA determines the allegation is not credible, DJAG or the SSA will forward the case to TPRA with a recommendation to close the case. TPRA will review the case and either 1) refers the matter to TJAG with a recommendation to close the case; or 2) refers the matter to the Advisory Committee for review.

5.4.2.1.1. The Advisory Committee may 1) recommend closure of the case to TJAG; or 2) direct TPRA to return the case to DJAG/SSA for appointment of an inquiry officer.

5.4.2.1.2. TJAG may delegate the authority to close a non-credible complaint to SSA's after consultation with TPRA.

5.4.2.2. Allegation is Credible. If upon initial review, DJAG or the SSA determines the allegation is credible, DJAG or the SSA will 1) appoint an inquiry officer; or 2) recommend TJAG find that the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.4.2.2.1. If DJAG or the SSA recommends TJAG find a minor or technical violation, the matter will be forwarded to the TPRA for submission to the Advisory Committee for review and recommendation to TJAG.

5.4.2.3. Upon receipt of a recommendation following initial review, TJAG may 1) close the case; 2) refer the matter back to DJAG or the SSA for appointment of an inquiry officer; 3) refer the matter back to the Advisory Committee to answer additional questions; or 4) determine the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.5. Conducting a Formal Inquiry.

5.5.1. The purpose of conducting a formal inquiry is to develop the facts and circumstances surrounding allegations of violations of the rules and standards so that TJAG can determine whether a violation occurred and take appropriate action.

5.5.2. The initiation of a formal inquiry is not intended to constitute the type of "ethics investigation" that most licensing authorities normally require attorneys to report. However, it is the responsibility of the subject of the inquiry to know and comply with his or her licensing authority's reporting requirements.

5.5.3. Inquiry Officer Requirements. An inquiry officer will be senior in grade to the subject of the inquiry. Exceptions to this requirement must be approved by TJAG or TJAG's designee. If the allegation involves a defense counsel and the performance of defense duties, the inquiry officer will be a defense counsel or former defense counsel to the extent possible. If the inquiry officer is to be a sitting defense counsel, the appointing official will coordinate with AFLOA/JAJD for that appointment. The inquiry officer will not come from the same office as the subject of the inquiry. The same inquiry officer may be appointed to investigate multiple subjects from the same complaint.

5.5.3.1. In cases involving conduct by ANG judge advocates not on Title 10 orders, the ANG Assistant to TJAG will appoint a senior ANG judge advocate to conduct the inquiry.

5.5.4. Inquiry Officer Responsibilities. The inquiry officer will determine the facts and circumstances surrounding the allegations by interviewing all relevant witnesses and collecting all relevant documents. The inquiry officer will take sworn statements from witnesses who provide relevant information. The inquiry officer should use the Secretary of the Air Force Office of the Inspector General Complaints Resolution Directorate's *Commander-Directed Investigation Guide*, or similar resource to assist in conducting the investigation and completing the inquiry report.

5.5.4.1. **Due Process.** The inquiry officer will notify the subject of the inquiry of the allegation(s) and the purpose of the inquiry, question the subject about the allegation(s) and provide the subject an opportunity to submit a sworn statement and other documentary evidence. The provisions of Article 31, UCMJ, apply when the subject is a military member and the inquiry officer has reason to suspect the subject has committed a criminal offense. Judge advocates that are the subject of a professional responsibility inquiry are entitled to the assistance of a military defense counsel or can retain civilian counsel at their own expense. Civilian attorneys must retain counsel at their own expense.

5.5.4.2. **Preparing and Submitting a Report.** The inquiry officer will prepare a report setting forth the facts of the case and conclusions as to whether or not any of the rules and standards may have been violated. The inquiry officer will attach to the report all statements and documents obtained during the inquiry. The inquiry officer will submit the report to the subject's SSA or DJAG as appropriate.

5.5.5. Standard of Proof. A "clear and convincing evidence" standard of proof will be used in reaching conclusions from the evidence developed.

5.5.6. DJAG/SSA Recommendation. Upon receipt and review of the report of inquiry, the SSA or DJAG, as appropriate, will provide a written recommendation to TJAG via TPRA regarding the disposition of the case. At a minimum, the recommendation should include reasons for approving or disapproving the findings of the inquiry officer and any recommended TJAG action.

5.6. Disposition of Allegations Following an Inquiry.

5.6.1. **TPRA.** Upon receipt of the case file following an inquiry, TPRA will review the file and may 1) concur with DJAG/SSA recommendation to close the case after a finding

of no violation and forward it directly to TJAG with a recommendation to close the case; or 2) refer the case to the Advisory Committee.

5.6.2. Advisory Committee. Upon receipt of the case following an inquiry, the Advisory Committee may do one of the following.

5.6.2.1. The Committee may return the case to TPRA for distribution back to DJAG or the SSA for further investigation.

5.6.2.2. The Committee may concur with DJAG/SSA recommendation to close the case after a finding of no violation and forward to TPRA for distribution to TJAG. In its discretion, the Committee may prepare a report supporting its concurrence to close the case.

5.6.2.3. When the Committee determines a violation has occurred, the Committee shall prepare a report including its findings, recommendations, and rationale for submission to TJAG. The report will clearly state what violations of the rules and standards the Committee found by clear and convincing evidence. The findings should be limited to the specific provisions allegedly violated. The report will include a copy of the case file. Minority reports are permitted. The Advisory Committee may make other observations about the case in a separate letter.

6. TJAG Action on Report of Inquiry. TJAG is not bound by the recommendations received from DJAG, the SSA, the Advisory Committee, or TPRA. TJAG will determine appropriate action in a case in TJAG's sole discretion. TJAG may take any of the following actions after receiving a report of inquiry.

6.1. Find no violation and close the case.

6.2. Direct further investigation.

6.3. Seek an opinion from the Advisory Committee.

6.4. Find a violation. If TJAG determines a violation has occurred, TJAG may take any of the following actions individually or in combination.

6.4.1. Characterize the violation as minor or technical and provide corrective counseling.

6.4.2. Admonish or reprimand the subject attorney.

6.4.3. Direct TPRA to forward the matter to the subject's commander or supervisory attorney for appropriate action.

6.4.4. Suspend the subject attorney's ability to practice before Air Force Courts pursuant to RCM 109.

6.4.5. Suspend a civilian attorney's authority to practice law in the AFJAGC pursuant to AFI 51-107.

6.4.6. Suspend or withdraw a judge advocate's designation and/or certification pursuant to AFI 51-103. The notice of reasons of such a withdrawal required by AFI 51-103 may be given simultaneously with the notice of other contemplated action. TJAG may combine all actions in a single communication.

6.5. If TJAG determines the subject violated any of the rules and standards and determines corrective action within TJAG's authority under paragraphs 6.4.4, 6.4.5 or 6.4.6 is warranted, TJAG will do the following.

6.5.1. Advise the subject of the proposed action.

6.5.2. Direct TPRA to send a copy of the relevant portions of the inquiry to the subject.

6.5.3. Give the subject 10 calendar days to submit written matters why TJAG should not take such action. The subject of the proposed action does not have a right to a personal appearance with TJAG.

6.5.3.1. Extensions and Waiver. TJAG may grant extensions to the period allowed to respond for good cause. A subject's failure to provide written comments in the time provided, including any extensions, constitutes a waiver of the opportunity to comment.

7. Post Decision Processing.

7.1. **Notification of Parties.** TPRA will notify the subject and the subject's SSA of the findings reached in the case. Notification to the complainant will be made in accordance with the Privacy Act. TJAG's action is final and not subject to appeal.

7.1.1. For ANG judge advocates, TPRA will notify the ANG Assistant to TJAG and the Adjutant General of the subject ANG judge advocate's state of any final action before notifying the ANG judge advocate of the ultimate disposition of the matter.

7.2. **Other Notification.** Investigations and results regarding senior officials and field grade officers will be reported to SAF/IGQ consistent with the guidance in AFI 90-301, *Inspector General Complaints Resolution*.

7.3. Reporting Cases to Licensing Officials.

7.3.1. Inquiries and actions taken under this instruction are not necessarily equivalent to the types of proceedings that require subjects to make a report to their state licensing official. However, findings or actions taken may trigger a requirement that the subject report the action to his or her licensing authorities. Ultimately, it is the responsibility of the subject attorneys to know and comply with the reporting requirements of their licensing authorities.

7.3.2. If TJAG determines any of the rules and standards have been violated and the seriousness of the violation warrants, TJAG may direct TPRA to report the matter to the appropriate licensing authorities of the subject attorney after notifying the subject that such a report will be made. Complaint information may be released to assist appropriate licensing and disciplinary authorities to meet their investigative and disciplinary proceeding responsibilities.

7.4. **Time Standards.** As a general rule, all efforts should be made to expedite an inquiry while safeguarding the appropriate due process requirements. The goal should be to complete inquiries within 120 calendar days from complaint to final action.

8. Effect of Separate Proceeding and Reciprocal Action. For purposes of this paragraph, the term "separate proceeding" includes, but is not limited to, court-martial, nonjudicial punishment,

administrative board, attorney disciplinary procedure, Inspector General investigation or similar civilian or military proceeding.

8.1. In those cases in which an attorney is determined to have committed misconduct at a separate proceeding which afforded procedural protection equal to that provided by an ethics inquiry under this instruction, the previous determination regarding the underlying misconduct may be considered *res judicata* with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the attorney an opportunity to respond with respect to whether the underlying misconduct constitutes a violation of the rules and standards and what sanctions, if any, are appropriate.

8.2. Notwithstanding paragraph 8.1, TJAG may dispense with an initial review and formal inquiry and, after affording the attorney written notice and an opportunity to respond in writing, take action in a case when the attorney has been:

8.2.1. Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Judge Advocate General or General Counsel of another Military Department;

8.2.2. Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals of the Armed Forces or by any Federal, State, or local bar; or

8.2.3. Convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court that, in TJAG's judgment, renders the attorney unqualified or incapable of properly or ethically representing the Department of the Air Force or a client when the attorney has been afforded procedural protection equal to that provided by an ethics investigation under this instruction.

9. Advisory Opinions.

9.1. **Written Requests.** The Advisory Committee may provide advisory opinions when requested. To the extent practicable, attorneys will request formal advisory opinions in writing. Requests will be sent to TPRA. While not required, attorneys are encouraged to send requests for advisory opinions through supervisory channels to TPRA. Prior to forwarding requests, supervisory SJAs should include their observations and recommendations. TJAG will review all written advisory opinions before they are issued and will decide whether and how the formal opinions will be published.

9.2. **Written Opinions.** When a request for a written advisory opinion is not practicable, attorneys may request an advisory opinion by calling TPRA. The Advisory Committee may, in very limited situations, issue an oral opinion, but only with the approval of TJAG. If an oral opinion is rendered, a written opinion restating the oral opinion will be prepared as soon as possible.

9.3. **Limitation.** Normally, the Advisory Committee will not provide advisory opinions concerning professional responsibility matters that are, at the time, the subject of litigation.

10. Off-Duty Legal Employment. An Air Force attorney's primary professional responsibility is to the Air Force, and Air Force attorneys are expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. Care must be taken to ensure that off-duty legal activities do not conflict with official duties. An activity conflicts with official duties if it is

prohibited by an applicable statute or regulation or would require the attorney's disqualification from matters that are so central or critical to the performance of official duties that the attorney's ability to perform such duties would be materially impaired.

10.1. Applicability. This guidance on off-duty legal employment applies to active duty judge advocates and civilian attorneys in the AFJAGC. Trial and appellate military judges must also observe additional restrictions contained in the Air Force Uniform Code of Judicial Conduct, Part IV, Canon 4 in AFI 51-201, Attachment 5. Air Force Reserve and Air National Guard judge advocates must adhere to the standards pertaining to off-duty representation contained in Attachments 4 and 5 of this instruction.

10.2. Definition. Off-duty legal employment is defined as any provision of legal advice, counsel, assistance, or representation, with or without compensation, that is not performed pursuant or incident to duties as an Air Force attorney (including employment while on terminal leave). Unless otherwise prohibited by statute or regulation, the following are excluded from this definition: 1) occasional uncompensated assistance rendered to relatives or friends; 2) the practice of law on the member's own behalf, or on behalf of parents, spouse, or children; and 3) teaching law as part of a program of education or training, or legal writing for educational purposes or for publication. The definition does include the provision of pro bono legal services.

10.3. Approval Required.

10.3.1. Staff Judge Advocates and Military Judges. SJAs and military judges seeking permission to engage in off-duty legal employment must first obtain written approval of their immediate commanders or supervisors and comply with relevant command policies. (T-3) Additionally, they must forward such requests through command judge advocate channels to TJAG or his designee for approval. (T-1) The request must identify the nature of the off-duty legal employment and include the approval of the immediate commander or supervisor.

10.3.2. Other Attorneys. Other attorneys desiring approval to engage in off-duty legal employment must receive written approval of their SJAs or equivalent and comply with relevant command policies.

10.3.3. No Endorsement. The approval to engage in off-duty legal employment does not in any way certify the qualifications or competencies of the Air Force lawyer to engage in that practice. Furthermore, because outside law practice is necessarily beyond the scope of the Air Force attorney's official duties, consideration should be given to obtaining personal malpractice insurance coverage.

10.4. Compliance with Professional Responsibility and Standards of Conduct Rules. Attorneys engaging in off-duty legal employment must ensure they adhere to applicable professional responsibility and standards of conduct rules.

10.4.1. Professional Responsibility Rules. Attorneys engaging in off-duty legal employment must comply with professional responsibility rules, including practice-related rules and licensing requirements of the jurisdiction in which they engage in such employment. This includes ensuring out-of-state attorneys may provide pro bono services without violating rules on the unauthorized practice of law or other local rules and regulations regarding professional fees or practice restrictions. It also includes

adhering to rules pertaining to terminating representation of a client if termination is necessary due to reassignment, deployment, or other reasons.

10.4.2. Standards of Conduct Rules. Attorneys engaging in off-duty legal employment must ensure that such activities are consistent with ethical standards of conduct. Accordingly, such attorneys must not engage in employment that would do any of the following.

10.4.2.1. Violate any Federal statute, rule or regulation, for example: 18 U.S.C. 202, et seq. (Federal Conflict of Interest Laws); 5 C.F.R. Part 2635 (Standards of Conduct for Employees of the Executive Branch); or the Joint Ethics Regulation, DoD 5500.07-R. Examples of criminal conflict of interest statutes include the following:

10.4.2.1.1. 18 U.S.C. 203. Federal officers and employees may not receive compensation for any representational services as agent or attorney in relation to a “particular matter” in which the United States is a party or has a direct and substantial interest.

10.4.2.1.2. 18 U.S.C. 205. Federal officers and employees may not act as agent or attorney to prosecute any claim against the United States, and may not act as agent or attorney before any Federal department concerning a “covered matter” in which the United States is a party or has a direct and substantial interest.

10.4.2.1.3. 18 U.S.C. 209. Federal officers and employees may not receive any salary or supplementation of salary as compensation for services as an officer or employee of the United States, from any source other than the Government of the United States.

10.4.2.2. Interfere with the proper and effective performance of the employee’s official duties, including time and availability requirements of his or her position. (See 5 C.F.R. 2635.705).

10.4.2.3. Provide legal services for compensation in an off-duty employment status to any person authorized legal assistance under AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*.

10.4.2.4. Otherwise cause a reasonable person to question the integrity of AFJAGC programs or operations. Accordingly, judge advocates must not wear their uniforms, use their official titles, or use official letterhead, official business cards, or other media while engaged in off-duty legal employment as doing so may create the appearance of impropriety or imply the Air Force endorses or has an interest in the matter.

10.5. Authority to Appear in Accordance with AFI 51-301, *Civil Litigation*.

10.5.1. Consistent with the above guidance, any judge advocate or civilian attorney who receives approval to engage in off-duty legal employment is authorized, pursuant to AFI 51-301, para 1.1.5, to appear in a civil judicial or administrative action.

10.5.1.1. Air Force lawyers shall not wear uniforms when representing clients off-base. This applies when representing a client through off-duty legal employment, the expanded legal assistance program, or other pro bono legal services.

11. Use of Legal Services Volunteers. Volunteers are an invaluable resource and perform many tasks worldwide, increasing the level of service AFJAGC is able to provide to its clients. Air Force legal professionals should use volunteers to the maximum extent practicable, subject to the limitations on the functions they can perform as outlined below. All volunteers shall read and sign the appropriate part of the DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities or Nonappropriated Fund Instrumentalities*.

11.1. Limitations.

11.1.1. 31 U.S.C. 1342, *Limitation on Voluntary Services*, prohibits federal government officials from accepting voluntary services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. Examples of voluntary services authorized by law that are regularly applicable to AFJAGC practice include 10 U.S.C. 1588, *Authority to Accept Certain Voluntary Services*, and 5 U.S.C. 3111, *Acceptance of Volunteer Service*.

11.1.1.1. 10 U.S.C. 1588 allows the Department of Defense to accept certain voluntary services, and DODI 1100.21, *Voluntary Services in the Department of Defense*, paragraph E3.2.3.9, includes legal assistance as an accepted volunteer program under 10 U.S.C. 1044, *Legal Assistance*.

11.1.1.2. 5 U.S.C. 3111 permits the acceptance of volunteer services pursuant to student intern programs.

11.1.2. Judge Advocate Functions. By statute, only attorneys qualified and designated by TJAG as judge advocates may perform judge advocate functions. (See 10 U.S.C. 8067(g)). As a result, legal services volunteers, even if licensed attorneys, may not perform the functions of a judge advocate. These include any functions that the UCMJ or Air Force instructions require to be performed by a judge advocate. Examples of such functions include acting as trial counsel, military defense counsel, legal advisor, or military judge in an Article 32 hearing or court-martial and serving as a recorder, legal advisor, or respondent's military counsel in an adverse administrative proceeding. For purposes of this restriction, "judge advocates" are those officers designated as judge advocates in accordance with AFI 51-103.

11.1.3. Military Defense Counsel. Military defense counsel responsibilities are, by their very nature, a judge advocate function. Therefore, volunteers serving in an area defense counsel (ADC) office or other office providing military defense services may not represent clients. They may perform paralegal-type functions under the supervision of a judge advocate. Care must be taken in such cases to maintain confidentiality of client matters. Military clients seeking representation should be advised of the status of any volunteer assisting a military defense counsel on the case. The degree of supervision required will vary depending on the nature of the task being performed and the skill level of the individual volunteer performing the task. This restriction does not prohibit a licensed attorney from entering into an attorney-client relationship with Air Force members.

11.1.4. Inherently Governmental Legal Functions. Legal services volunteers, even if licensed attorneys, may not perform "inherently governmental functions" within the meaning of Office of Management and Budget Circular No. A-76. Examples of legal

actions which fall into this category include decisions to settle claims against the government; decisions to assert, settle, or drop pro-government claims; and decisions establishing the government position or strategy with respect to civil litigation issues.

11.1.5. Other Legal Services Functions. As a matter of policy, legal services volunteers, even if licensed attorneys, may not be permitted to provide direct, unsupervised advice to legal assistance clients or to commanders or other agency clients on matters affecting Air Force interests. They may, however, perform paralegal-type functions or provide other legal services if acting under the direction, supervision, and control of an Air Force military or civilian attorney. Examples of permissible uses include researching, drafting legal opinions for review and signature by an Air Force attorney, and assisting with legal assistance matters (such as drafting wills and providing tax return preparation) under the supervision of an Air Force attorney. The degree of supervision required will vary depending on the nature of the task being performed and the skill level of the individual volunteer performing the task.

11.2. Confidentiality and Standards of Professional Conduct. All legal service volunteers must be briefed on, understand, and comply with the same confidentiality requirements applicable to all members of the legal staff. All legal services volunteers must read and sign a confidentiality agreement. A sample agreement is provided at Attachment 6. In addition, volunteers performing paralegal functions or providing other legal services under the supervision of an attorney must be briefed on, understand, and comply with the rules and standards in Attachments 2 and 3.

ROBERT G. KENNY
Major General, USAFR
Performing Duties of The Judge Advocate General

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

AFI 51-103, *Designation and Certification of Judge Advocates*

AFI 51-107, *Employment of Civilian Attorneys*

AFI 51-201, *Administration of Military Justice*

AFI 51-301, *Civil Litigation*

AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*

AFI 90-301, *Inspector General Complaints Resolution*

DODI 1100.21, *Voluntary Services in the Department of Defense*

DoD 5500.07-R, Joint Ethics Regulation

Manual For Courts-Martial, United States

5 Code of Federal Regulations Part 2635

OMB Circular No. A-76

Title 5 United States Code, Section 3111

Title 10 United States Code, Section 1044

Title 10 United States Code, Section 1588

Title 10 United States Code, Section 8037

Title 10 United States Code, Section 8067

Title 18 United States Code, Section 202

Title 18 United States Code, Section 203

Title 18 United States Code, Section 205

Title 18 United States Code, Section 209

Title 31 United States Code, Section 1342

Adopted Forms

AF Form 847, *Recommendation for Change of Publication*

Abbreviations and Acronyms

AFI—Air Force Instruction

ACC—Air Combat Command

AETC—Air Education and Training Command

AFDW—Air Force District of Washington

AFGSC—Air Force Global Strike Command

AFMC—Air Force Materiel Command
AFSOC—Air Force Special Operations Command
AFSPC—Air Force Space Command
AMC—Air Mobility Command
AFRC—Air Force Reserve Command
AFLOA—Air Force Legal Operations Agency
AFMAN—Air Force Manual
ANG—Air National Guard
AFRIMS—Air Force Records Information Management System
AFRPC—Air Force Rules of Professional Conduct
CLE—Continuing Legal Education
CFR—Code of Federal Regulations
DJAG—Deputy Judge Advocate General
FLITE—Federal Legal Information Through Electronics
JER—Joint Ethics Regulation
MCM—Manual for Courts-Martial
PACAF—Pacific Air Forces
RCM—Rule for Court Martial
SSA—Senior Supervising Attorney
TJAG—The Judge Advocate General
AFJAGC—Air Force Judge Advocate General’s Corps
TPRA—The Professional Responsibility Administrator
UCMJ—Uniform Code of Military Justice
USAFE—United States Air Forces Europe
USC—United States Code

Attachment 2**AIR FORCE RULES OF PROFESSIONAL CONDUCT****INTRODUCTION TO THE AIR FORCE RULES OF PROFESSIONAL CONDUCT****CHAPTER 1 LAWYER-CLIENT RELATIONSHIP**

Rule 1.0	Terminology
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.3	Diligence
Rule 1.4	Communication
Rule 1.5	Fees
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 1.9	Duties to Former Clients
Rule 1.10	Imputation of Conflicts of Interest: General Rule
Rule 1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	The Air Force as Client
Rule 1.14	Client With Diminished Capacity
Rule 1.15	Safekeeping Property
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Sale of Law Practice
Rule 1.18	Duties to Prospective Client

CHAPTER 2 COUNSELOR

Rule 2.1	Advisor
Rule 2.2	[Deleted]
Rule 2.3	Evaluation for Use by Third Persons
Rule 2.4	Lawyer Serving as Third-Party Neutral

CHAPTER 3 ADVOCATE

Rule 3.1	Meritorious Claims and Contentions
Rule 3.2	Expediting Litigation
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer as Witness
Rule 3.8	Special Responsibilities of a Trial Counsel

Rule 3.9 Advocate in Nonadjudicative Proceedings

CHAPTER 4 TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

Rule 4.2 Communication with Person Represented by Counsel

Rule 4.3 Dealing with Unrepresented Person

Rule 4.4 Respect for Rights of Third Persons

CHAPTER 5 THE JUDGE ADVOCATE GENERAL'S CORPS

Rule 5.1 Responsibilities of a Supervisory Lawyer

Rule 5.2 Responsibilities of a Subordinate Lawyer

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Rule 5.4 Professional Independence of a Lawyer

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

Rule 5.6 Restrictions on Right to Practice

Rule 5.7 Responsibilities Regarding Judge Advocate Non-Law Duties

CHAPTER 6 PUBLIC SERVICE

Rule 6.1 Pro Bono Publico Service

Rule 6.2 Accepting Appointments

Rule 6.3 Membership in Legal Services Organizations

Rule 6.4 Law Reform Activities Affecting Client Interests

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

CHAPTER 7 INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Direct Contact with Prospective Clients

Rule 7.4 Communication of Fields of Practice and Specialization

Rule 7.5 Firm Names and Letterheads

Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

CHAPTER 8 MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admissions and Disciplinary Matters

Rule 8.2 Judicial and Legal Officials

Rule 8.3 Reporting Professional Misconduct

Rule 8.4 Misconduct

Rule 8.5 Discipline Authority: Choice of Law

INTRODUCTION TO THE AIR FORCE RULES OF PROFESSIONAL CONDUCT

The *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*) apply to all military and civilian lawyers in the Air Force Judge Advocate General's Corps. This includes host nation lawyers employed overseas by the Department of the Air Force, to the extent the *Rules* are not inconsistent with their domestic law and professional standards (see Rule 8.5). The *Rules* apply to ANG judge advocates performing duty in Title 10 or Title 32 status. The *Rules* also apply to all lawyers who practice in Air Force courts and other proceedings under the UCMJ/MCM, including, but not limited to, civilian defense counsel with no connection to the Air Force. Although the AFRPC are not punitive in nature, they establish the minimum standards of ethical conduct demanded of covered individuals. Violations may be addressed administratively, or through actions to suspend practice or withdraw certification or designation.

Beyond establishing minimum standards, the *Rules* are designed to meet three important objectives. They provide workable guidance to Air Force lawyers, they are specific to the problems and needs of our practice, and they are accessible to Air Force lawyers assigned throughout the world. The AFRPC are directly adapted from the *American Bar Association (ABA) Model Rules of Professional Conduct*, with important contributions from *Army Rules of Professional Conduct for Lawyers* and the Navy instruction: *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*. The ABA made comprehensive amendments to its Model Rules of Professional Conduct in 2002, 2003, and 2009 and the Air Force adopted a number of these changes.

Where an ABA rule has been altered, the Air Force rule indicates that it was modified. Where material has been added, the new material is so labeled, and the term "substituted" indicates that a rule has been entirely replaced. Simple terminology changes made to conform a rule to Air Force practice, without substantive changes, are not annotated as being modified. Some of the *Rules* contain discussion sections, designed to explain or amplify the rule, place it in context, or provide additional guidance. Discussions are interpretive tools, not binding upon counsel, but helpful in understanding and using the *Rules*. Although the comments to the *ABA Model Rules* have not been incorporated, counsel are encouraged to consult them for guidance and assistance in placing the *Rules* in context. In doing so, counsel must be aware that the AFRPC were specifically adapted to the unique needs and demands of Air Force practice, and not all of the ABA comments will be helpful.

One of the more difficult issues Air Force lawyers may confront is identifying the client and where the counsel's loyalties belong. Rule 1.13 addresses this question at length and cautions that, under some circumstances, a lawyer may encounter a conflict between his or her obligation to the Air Force as the client, and the needs and interests of individual officials, employees, and agents of the Air Force. Another difficult area is the question of client confidentiality (Rule 1.6). Although language was added to recognize Air Force security and mission needs, the Air Force rule very closely follows the ABA rule with respect to confidentiality.

In adapting the *Rules*, a conscious attempt was made to balance Air Force needs with the position of Air Force lawyers as members and leaders in the mainstream of the legal profession in the United States. It is an appropriate balance, but one that carries heavy obligations to the service

and the profession. The quality and professionalism of the lawyers in this Corps provide ample assurance that those obligations will be met.

CHAPTER 1

LAWYER-CLIENT RELATIONSHIP

Rule 1.0. Terminology

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, a court-martial, an administrative discharge board, a board of inquiry, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.1. COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.

Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) [Modified] Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive trial by court members, the composition of the court, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage in, or assist a client in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) An Air Force attorney's authority and control over decisions concerning representation may, by law, be expanded beyond the limits imposed by paragraphs (a) and (c).

DISCUSSION

Subsection (a) recognizes the balance between a client's ultimate authority within the limits imposed by law and the lawyer's professional responsibilities to determine the purposes to be served by the representation and the lawyer's responsibility for tactical and technical issues and considerations. Some decisions, such as whether to stipulate or proffer a pretrial agreement, must be made jointly by the lawyer and client within the context of applicable regulations, the UCMJ, and MCM. The subsection was modified slightly to include the client's sole authority, within the limits prescribed by RCM 903 and in AFI 51-201, to elect the composition of his or her court-martial. See also, *Air Force Standards for Criminal Justice* (AFSCJ or the *Standards*), Standard 4-5.2 and Standard 4-8.2.

The objectives and scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-client relationships and representation of clients by Air Force lawyers is permissible only when authorized by competent authority. Thus, notwithstanding Rule 1.2(a) and(c), Air Force lawyers are subject to directions of officials at higher levels within the Department. When acting pursuant to properly delegated authority, these officials may authorize or require some variance in the scope of representation otherwise agreed upon between the lawyer and a lower level official. For example, the Secretary of the Air Force may: prescribe who is entitled to legal assistance; limit the scope of consultation when an individual is deciding whether to accept nonjudicial punishment; or limit the scope of representation at a hearing to review pretrial confinement. When the objectives or scope of services provided by the lawyer are limited by law, the lawyer should ensure at the earliest opportunity that the client is aware of such limitations. Subsection (e) was added to reflect this aspect of Air Force practice.

Rule 1.3. DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. COMMUNICATION

(a) A lawyer shall

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. FEES

A lawyer shall not receive outside compensation for work performed as part of official government duties.

DISCUSSION

Air Force lawyers do not charge or collect fees. Civilian lawyers who do are regulated and may be sanctioned by state or federal bar authorities.

Rule 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) [Modified] to prevent reasonably certain death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or

(4) to comply with other law or court order.

DISCUSSION

Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the United States Air Force. A lawyer's duty to a client is a strong one. If it is possible for the lawyer to act to prevent ongoing or potential criminal misconduct without violating a client confidence, those actions should always be considered first. In the circumstances described in the rule, a lawyer is excused from his fundamental obligation to preserve client confidences. See also Rule 1.13, Rule 5.4, and Standard 4-3.7.

Rule 1.6 contemplates disclosure based on client consent. In the organizational context, the proper Air Force authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or Air Force official with decision making authority regarding the subject matter of the representation or superior authority.

Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

DISCUSSION

Some limitations may be inherent in representation by an Air Force lawyer. Counsel should always ensure that each client is aware of such limitations and how they may specifically affect the representation. See Rule 1.2, Rule 1.4, Rule 1.13, and Standard 4-3.5.

Rule 1.7(b) contemplates waiver of a conflict based on client consent in certain cases. In the organizational context, the proper Air Force authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or Air Force official with decision making authority regarding the subject matter of the representation, that official's staff judge advocate or superior authority.

Rule 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) [Modified] A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation.

[(f) Omitted]

(g) [Modified] A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) [Omitted]

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) [Omitted]

DISCUSSION

Conflicts of interest in the nature of prohibited transactions are specifically prohibited by the *Joint Ethics Regulation* (JER), DoD 5500.7-R. That regulation, the underlying Department of Defense Directive 5500.7, *Standards of Conduct*, and applicable Federal statutes (see generally 5 U.S.C. Section 7301 and 18 U.S.C. Sections 202 to 209) are an Air Force lawyer's primary authority concerning conflicts of this nature.

Language concerning aggregated pretrial agreements in criminal cases was deleted from subsection (g) as inapplicable to military practice (see RCM. 705 and AFI 51-201, Chapter 6).

By adopting the ABA rule, the Air Force rule establishes only ethical parameters. It is doubtful that Air Force lawyers will find it necessary to obtain releases such as the ones described in 1.8(h). See 10 U.S.C. Section 1054 and 28 U.S.C. Sections 1346 (b) and 2672 limiting remedies for malpractice by Air Force lawyers to actions against the United States.

Subsections (f), (i) and (k) were omitted as being inapplicable to Air Force practice. Subsection (j) addresses sexual relations with clients. Additional regulatory guidance may further prohibit sexual relations between clients and attorneys, including rules on fraternization, unprofessional relationships, adultery, conduct unbecoming an officer, and misuse of position and may constitute separate grounds for disciplinary or administrative action.

Rule 1.9. DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10. IMPUTED DISQUALIFICATION [Substituted]

Air Force lawyers who work in the same military law office are not automatically disqualified from representing a client even if other Air Force lawyers in that office would be prohibited from doing so by Rule 1.7, Rule 1.8(c), or Rule 1.9.

DISCUSSION

Lawyer associations such as law firms are not directly analogous to military legal offices. The appropriate test is whether an actual conflict exists that directly prejudices the interests of a client. See *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987); *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987) and *United States v. Payton*, 23 M.J. 379 (C.M.A. 1987), all dealing generally with conflicts in criminal cases.

Rule 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

[Subsections (a), (b) and (c) are omitted. See the JER and applicable law. See also Discussion, Rule 1.8 *supra*.]

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment; unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) [Modified] negotiate for private employment with any person or organization who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12. FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person, or as an arbitrator, mediator or other third party neutral unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third party-neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

[(c) Omitted]

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

DISCUSSION

Paragraph (b) indicates a lawyer serving as law clerk may negotiate for employment with a party or lawyer involved in a matter after notifying the judge. Such negotiation must comply with other rules regarding post-government employment, as applicable.

Rule 1.13. THE AIR FORCE AS CLIENT

(a) [Modified] Except when authorized to represent an individual client, the government of the United States, or another government agency, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

(b) [Modified] If an Air Force lawyer knows that an official, member, employee, or other person associated with the Air Force is acting, intends to act, or refuses to act in an official matter in a way that is either a violation of the person's legal obligations to the Air Force or a violation of law which reasonably might be imputed to the Air Force, the lawyer shall proceed as is reasonably necessary in the best interest of the Air Force. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the apparent motivation of the person involved, the policies of the Air Force concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) advising the person that, in the lawyer's opinion, the action, planned action, or refusal to act is contrary to law or regulation; advising the person of Air Force policy on the matter concerned; advising the person that his or her personal legal and professional interests are at risk; and asking the person to reconsider the matter;

(2) suggesting that a separate legal opinion on the matter be sought for presentation to the person or other appropriate Air Force authority;

(3) advising that person that the lawyer is ethically obligated to preserve the interests of the Air Force and, as a result, must consider discussing the matter with senior Air Force lawyers in the lawyer's office or at the next level of command and, again, asking the person to reconsider the matter;

(4) consulting with senior Air Force lawyers including, if warranted by the seriousness of the matter, referring the matter to the Air Force lawyer who serves as counsel to the person's superior in the chain of command.

(c) [Modified] If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the Air Force insists upon action or refusal to act that is clearly a violation of law, the lawyer may consult with senior Air Force lawyers at the same level of command or at higher levels of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid violation of the law by the Air Force and to prevent the lawyer from participating or assisting in a violation of the law. In no event shall the lawyer participate or assist in the illegal activity.

(d) [Modified] In dealing with Air Force officials, members, employees, or other persons associated with the Air Force, a lawyer shall explain that the Air Force is the lawyer's client when the lawyer knows or reasonably should know that the Air Force's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.

(e) [Modified] A lawyer representing the Air Force may also represent any of its officials, members, or employees subject to the provisions of Rule 1.7 and other applicable authority. If the Air Force's consent to representation of such individuals is required by Rule 1.7, the consent shall be given by the MAJCOM SJA or equivalent. If the MAJCOM SJA or equivalent is requesting consent, then consent shall be given by DJAG.

(f) [Added] A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual (including Special Victims' Counsel), has, for those purposes, a lawyer-client relationship with that individual.

DISCUSSION

With limited exceptions, an Air Force lawyer represents the Department of the Air Force as it acts through its authorized representatives. Exceptions include, but are not limited to, lawyers assigned to represent individuals under subsection (f), trial counsel who represent the government of the United States, counsel assigned to perform special duties such as assignment to the Department of Defense, a Department of Defense component, Department of the Air Force Office of the General Counsel, as an Assistant United States Attorney or other federal agency. In representing the Air Force, counsel serves his or her client by interacting with Air Force officials, members, and employees. When an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is protected from disclosure to anyone outside the Air Force under Rule 1.6. However, this does not mean that the official, employee, or member is a client of the Air Force attorney. It is the Air Force, not the official, employee, or member, that benefits from Rule 1.6 confidentiality. The Air Force's entitlement to confidentiality may not be asserted by an official, employee, or member to conceal personal misconduct from Air Force authorities.

If a lawyer knows that the Air Force may be substantially injured by an action of an official, member, or employee and the action is in violation of law, it may be necessary for the lawyer to take steps to have the matter reviewed by higher Air Force authority.

Air Force lawyers are required to act in a manner consistent with these rules. As discussed in the *Rules*, loyalty and confidentiality are ethical obligations owed to the Air Force and cannot be compromised. As professional military officers and trusted counsel, it is also essential for Air Force lawyers to be personally loyal to the commanders, officials, and other individuals whom the lawyers advise. Loyalty and confidentiality are professional traits that are virtues only when they are consistent with a lawyer's ethical obligations to the client: the Air Force.

Determining whether to reveal communications with a commander to higher Air Force authority requires mature judgment and common sense. If a lawyer perceives a conflict between his or her professional commitments to the commander and his or her ethical obligations to the Air Force, he or she may consult with a supervisory Air Force lawyer (see Rule 5.1 and Rule 5.2). If the situation cannot be resolved at that level, the senior lawyer should consult with appropriate Air Force lawyers at the next level of command. In extreme cases it may be necessary to refer the matter to The Judge Advocate General.

Conflicts of Interest. When Air Force interests are or become adverse to those of an individual authorized to act on behalf of the Air Force, the lawyer must advise the individual concerning the conflict. In such circumstances, the advice should explain that the lawyer cannot represent the individual, and that the individual may wish to obtain independent representation by an Air Force lawyer authorized to provide such representation or by other counsel. Care must be taken to ensure that the individual understands that when interests conflict, the Air Force lawyer represents the Air Force, not the individual, and discussions between the lawyer and the individual may not be privileged. The specific facts of each case will determine whether such a warning should be given by an Air Force lawyer to any official, member, or employee (see Rule 1.6 and Rule 5.4).

Rule 1.14. CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective measures pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15. SAFEKEEPING PROPERTY

(a) [Substituted] Air Force lawyers will hold the property of clients or other persons only when doing so is necessary to further the representation of the client. When it is necessary for a lawyer to hold property, the lawyer must exercise the care of a fiduciary. Such property shall be clearly labeled or otherwise identified, held apart from the lawyer's personal property or from government property, and counsel should exercise substantial care to ensure the safety of the property. Property should be promptly returned when it is no longer necessary for the lawyer to retain it in order to further representation.

(b) [Substituted] When property of a client or third party is admitted into evidence or otherwise included in the record of an administrative or criminal proceeding, the lawyer should take reasonable action to ensure its prompt return.

DISCUSSION

Legal assistance lawyers and area defense counsel will often need to receive documents and other items from clients in order to properly investigate, research, and complete legal matters. This rule sets very basic, minimum standards for safeguarding such property. Subsection (b) requires counsel to take reasonable steps to secure the return of evidence to its owner, bearing in mind that return may not be possible until appellate review is completed.

In very rare circumstances, counsel may find it necessary to hold money or securities for a client or interested party. Counsel should be guided by existing Air Force instructions and policy as well as ABA Rule 1.15, which requires, *inter alia*, depositing funds or securities in an appropriate, separate trust account or safety deposit box. The same general rule applies in situations involving money. Such property should only be accepted and held by a lawyer when doing so is necessary to further the client's representation.

Rule 1.16. DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the AFRPC or the law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) [Modified] the lawyer is discharged by the client.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- [(6) Omitted]
- (7) or other good cause for withdrawal exists.

(c) [Modified] A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) [Modified] Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled. The lawyer may retain papers relating to the client to the extent permitted by other law.

DISCUSSION

Subsection (b)(6) was omitted because Air Force lawyers will rarely, if ever, be exposed to unreasonable financial burdens related to representation. Addition of the language "or other competent authority" in subsection (c) recognizes that Air Force lawyers are not always free to withdraw from representation. Competent authority may be supervising lawyers, or in some cases, counsel's superiors within his or her chain of command. Specific facts will govern each case. Finally, since Air Force lawyers will not receive advance payments or fees, reference to such payments was deleted from subsection (d).

Rule 1.17. SALE OF LAW PRACTICE [Omitted as inapplicable]

Rule 1.18. DUTIES TO PROSPECTIVE CLIENT [Modified]

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) [Modified] A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) [Modified] the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

CHAPTER 2**COUNSELOR****Rule 2.1. ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Rule 2.2. INTERMEDIARY (deleted).**Rule 2.3. EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

CHAPTER 3

ADVOCATE

Rule 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

(a) [Modified] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or discharge, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) [Added] A lawyer does not violate this rule by raising issues in good faith reliance upon court precedent.

DISCUSSION

See, for example, *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Rule 3.2. EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

DISCUSSION

Subsection (a)(3) emphasizes that lawyers must not help clients commit perjury, even by remaining silent when the lawyer knows that the client has offered false testimony. Subsection (a)(3) recognizes the special context of criminal defendants, requiring defense counsel to know (vice reasonably believing) the evidence is false before refusing to offer client testimony. Counsel must do everything in their power to dissuade a client from lying, including seeking leave to withdraw from representation (see Rule 1.16), advising the client that the lawyer cannot argue or otherwise use the false testimony, and that the lawyer is obligated to disclose the perjury. See *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). This rule must be distinguished from Rule 1.6, which addresses a lawyer's duty to preserve client confidences. By committing perjury, a client may be said to waive confidentiality as to the false testimony. As the Court pointed out in *Whiteside*, although a client may have the right to testify, that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *United States v. Baker*, 58 M.J. 380 (C.A.A.F. 2003); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. The obligations in this Rule also apply to counsel for witnesses, including Special Victims' Counsel. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

The term "legal authority in the controlling jurisdiction" in (a)(2) refers to Air Force or Department of Defense regulations or directives, the MCM, opinions by military appellate courts, or similar authorities.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

DISCUSSION

Rule 3.4(f) permits Air Force lawyers to advise officials, members, and employees of the Air Force to refrain from giving information to another party, especially when the individual's interests coincide with those of the Air Force. (See Rule 1.13 and Rule 4.2.)

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) [Modified] seek to influence a judge, court or board member, prospective court or board member, or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) [Modified] communicate with a court or board member or prospective court or board member after discharge of the court or board if:

(1) the communication is prohibited by law or court order;

(2) [Modified] the court or board member has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

DISCUSSION

Terminology was modified to be consistent with Air Force practice.

Rule 3.6. PUBLICITY.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

or

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DISCUSSION

Air Force members must comply with applicable laws and regulations in making public statements of any kind. Public statements include comments made through social media. See, for example, AFI 51-201, Chapter 13; *The Freedom of Information Act* (FOIA), 5 U.S.C. 552; DoD 5400.7-R_AFMAN 33-302 *Freedom of Information Act Program*; *The Privacy Act*, 5 U.S.C. 552a; AFI 33-332, *Air Force Privacy Program*; and *The Victim and Witness Protection Act*, 42 U.S.C. 10601-10605. Defense counsel, both military and civilian, must refer not only to Rule 3.6, but also to Standard 4-1.3 and Standard 8-1.1. Air Force prosecuting lawyers must refer not only to Rule 3.6, but also to Standard 3-1.3 and Standard 8-1.1. Other court personnel must refer to Rule 3.6 and Standard 8-2.2. Finally, although not a party, special victims' counsel must also comply with this rule. Based on their position, extrajudicial statements by special victims' counsel could prejudice a proceeding.

Rule 3.7. LAWYER AS WITNESS

(a) [Modified] A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

DISCUSSION

See *United States v. Smith*, 35 M.J. 138 (C.M.A. 1992); *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988); *United States v. Barnes*, 63 M.J. 563 (A.F.Ct. Crim.App. 2006).

Rule 3.8. SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL [Modified]

The trial counsel in a criminal case shall:

(a) [Substituted] recommend that the convening authority withdraw any charge or specification not warranted by the evidence;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) [Modified] not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a pretrial investigation under Article 32, UCMJ;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal;

(e) [Omitted]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the trial counsel in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, or this Rule.

(g) When a trial counsel knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the trial counsel shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the trial counsel's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the accused was convicted of an offense that the accused did not commit.

(h) When a trial counsel knows of clear and convincing evidence establishing that an accused in the trial counsel's jurisdiction was convicted of an offense that the accused did not commit, the prosecutor shall seek to remedy the conviction.

DISCUSSION

This rule was modified to conform to military practice. In addition, the term "trial counsel" was substituted for "prosecutor"; however, the rule should be read to include other persons

involved in a prosecution such as, for example, the SJA and Chief of Military Justice. See also Rules 5.1 to 5.3.

Rule 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 3.3(a) through (c), Rule 3.4(a) through (c), and Rule 3.5.

CHAPTER 4

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

DISCUSSION

Communication with an officer, employee, or member of an organization represented by counsel is also included under this rule (see Rule 1.13 and Rule 3.4). A lawyer may not contact such persons without the other lawyer's consent or unless otherwise authorized by law.

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law include, for example, the right of a party to a controversy to speak with Government officials about the matter. Communications authorized by law may also include investigative activities advised upon by government lawyers, which are done by investigative agents prior to the preferral of charges.

Rule 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

CHAPTER 5

THE JUDGE ADVOCATE GENERAL'S CORPS

Rule 5.1. RESPONSIBILITIES OF A SUPERVISORY LAWYER

(a) [Modified] The Judge Advocate General shall make reasonable efforts to ensure that the Corps has in effect measures giving reasonable assurance that Air Force lawyers conform to the AFRPC.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the *Rules*.

(c) A lawyer shall be responsible for another lawyer's violation of the *Rules* if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

DISCUSSION

This rule was modified slightly in order to conform to military practice and recognize The Judge Advocate General's specific authority under Article 6, UCMJ, and RCM 109. *See also* AFI 51-102, *The Judge Advocate General's Department*.

Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by these *Rules* notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these *Rules* if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a paralegal or other nonlawyer employed or retained by, associated with, or supervised by a lawyer:

(a) [Modified] the senior Air Force lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the conduct of nonlawyers is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these *Rules* if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

DISCUSSION

Subsections (a) and (c) were modified slightly in order to conform with Air Force practice.

Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

[Substituted] Notwithstanding a judge advocate's status as a commissioned officer, or a civilian Air Force lawyer's responsibilities to higher authorities, an Air Force lawyer detailed or assigned to represent an individual is expected to exercise unfettered loyalty to the individual client. The lawyer shall exercise professional independence during the course of the representation consistent with the *Rules*, and is ultimately responsible for acting in the best interest of the individual client.

DISCUSSION

The substituted language was adapted from the Army and Navy rules. This Rule recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes a similar status of a civilian Air Force lawyer. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties.

Not all direction given to a subordinate lawyer is an attempt to improperly influence the lawyer's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A lawyer subjected to outside pressures should make full disclosure of them to the client. If the lawyer or client believes the effectiveness of the representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client. The rule itself sets a clear standard that all lawyers are obligated to meet. See also Rules 1.6 and 1.13(f).

Rule 5.5. UNAUTHORIZED PRACTICE OF LAW [Modified]

Except as authorized by Air Force Instructions or other directives, a lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) [Substituted] assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(c) [Omitted]

(d) [Omitted]

DISCUSSION

An Air Force lawyer's performance of legal duties pursuant to military authorization is a federal function not subject to state regulation. Thus, an Air Force lawyer may perform legal assistance even though the lawyer is not licensed in the state where his or her duty station is located. Paragraph (b) does not prohibit a lawyer from using the services of nonlawyers and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, Air Force lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law (for example, claims adjusters, social workers, and other persons employed in government agencies). In addition, the comment to the ABA rule specifically permits lawyers to counsel nonlawyers who wish to proceed pro se, a situation which often arises during legal assistance counseling. Paragraphs (c) and (d) were omitted as inapplicable to Air Force practice.

Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE [Omitted]

Rule 5.7. RESPONSIBILITIES REGARDING JUDGE ADVOCATE NON-LAW DUTIES [Modified]

A judge advocate shall also be subject to these Rules with respect to non-legal, but official, duties performed as an officer.

DISCUSSION

This Rule is derived from ABA Model Rule 5.7, *Responsibilities regarding Law-Related Services*. The judge advocate practice of law is similar to a corporate practice in that an attorney performs a combination of non-law, law-related, and purely legal activities for a single employer. The non-law duties performed by a judge advocate meet the definition of “law-related services” found in paragraph (b) of Model Rule 5.7. These duties are commingled within the judge advocate practice and are not otherwise independent, separate, or distinguishable.

CHAPTER 6

PUBLIC SERVICE

Rule 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE

[Modified] A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

DISCUSSION

Provided that all professional licensing requirements are met, active duty judge advocates and civilian attorneys may provide pro bono legal services. See paragraphs 10 through 10.5 of this instruction for specific requirements for pro bono service.

Rule 6.2. ACCEPTING APPOINTMENTS [Omitted]

Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

[Modified] A lawyer may serve as a director, officer, or member of a legal services organization, apart from the Air Force, notwithstanding that the organization serves persons having interests adverse to the Air Force. The lawyer shall not knowingly participate in a decision or action of an organization if such participation would be incompatible with the lawyer's obligations to the Air Force.

DISCUSSION

Rule 6.3, as modified, recognizes that Air Force lawyers may join legal services (i.e., professional) organizations. A lawyer's participation in such organizations must be consistent with the direction and guidance of the JER. For example, JER Section 3, paragraph 3-300b provides guidance on personal participation in non-federal entities, including professional associations and learned societies. *See also* Rule 1.7 and Rule 6.1. The second sentence recognizes that participation in certain of an organization's activities may not be permissible for Air Force lawyers. Some activities are, by their nature, contrary to Air Force interests. *See* JER Section 3, paragraph 3-300b.

Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

[Modified] A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of the Air Force.

DISCUSSION

See the JER, Rule 1.7, and Rule 6.3.

**Rule 6.5. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES
PROGRAMS**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows the representation of the client involves a conflict of interest.

(2) [Omitted]

(b) [Omitted]

CHAPTER 7

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2. ADVERTISING [Omitted]

Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS [Omitted]

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE [Omitted]

Rule 7.5. AIR FORCE LETTERHEAD

[Substituted] An Air Force lawyer shall not use official Air Force letterhead when communicating in a private capacity nor when representing a legal assistance client to a third party.

DISCUSSION

Air Force attorneys must avoid the appearance of governmental sanction or endorsement of personal activities. *See* JER 3-209 and 3-300. *See also* AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, paragraph 1.6.4, precluding the use of Air Force letterhead when writing on behalf of a legal assistance client. Special Victims' Counsel are authorized to use official letterhead in the course of representing victims. Additionally, this rule is not meant to prevent the use of official letterhead for letters of recommendation as authorized by 5 CFR 2635.702(b).

Rule 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES [Omitted]

CHAPTER 8

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. BAR ADMISSIONS AND DISCIPLINARY MATTERS

[Modified] An applicant for admission to a bar; or a lawyer in connection with a bar admission application; a lawyer seeking appointment in The Judge Advocate General's Corps, USAF; or a lawyer in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge, adjudicatory officer, public legal officer, or candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the *Air Force Uniform Code of Judicial Conduct*.

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the *Rules* that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) [Modified] This rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these *Rules*, knowingly assist or induce another to do so, or do so through the acts of another;

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these *Rules* or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

DISCUSSION

An Air Force attorney that advises on a lawful investigative activity, including providing guidance on undercover activity that involves the use of subterfuge or misrepresentation by investigators, does not violate subsection (c) of this rule.

Rule 8.5. JURISDICTION

[Substituted] (a) These *Rules* apply to all military and civilian lawyers in the Air Force Judge Advocate General's Corps. This includes host nation lawyers employed overseas by the Department of the Air Force to the extent the *Rules* are not inconsistent with their domestic law and professional standards. Jurisdiction also applies to all lawyers who practice in Air Force courts and other proceedings under the MCM, including, but not limited to, civilian defense counsel with no connection to the Air Force. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

[Substituted] (b) A lawyer may be subject to the disciplinary authority of the Air Force and another jurisdiction for the same conduct. In the case of a conflict between these *Rules* and the rules of the lawyer's licensing authority, the lawyer should attempt to resolve the conflict with the assistance of a supervising lawyer. If the conflict is not resolved, these *Rules* will govern the conduct of the lawyer in the performance of the lawyer's official responsibilities. In the event of a conflict between these *Rules* and the rules of the lawyer's licensing authority for ANG judge advocates in the performance of official duties or while in a duty status, the more restrictive of the two shall govern. The rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer's official responsibilities.

DISCUSSION

While these *Rules* may preempt state rules in the event of a conflict, attorneys and managers should avoid such conflicts whenever possible. In the unlikely event that compliance with a state rule has the potential to interfere with the effective performance of Air Force duties, the lawyer should seek guidance from the supervisory chain, and, if necessary, seek an advisory opinion under these *Rules*.

Attachment 3
AIR FORCE STANDARDS FOR
CIVILITY IN PROFESSIONAL CONDUCT¹

PRINCIPLES OF GENERAL APPLICABILITY:
LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY

General Principles:

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staffs, parties, witnesses, judges, court personnel, and other staff, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.
2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor, our clients' ill feelings, if any, towards other participants in the legal process.
3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process; nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from directing disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.
4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.
5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.
6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry, in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation, as well as disputed matters that are not, or are not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of all transactions.
7. The foregoing General Principles apply to all aspects of legal proceedings, both in the presence and outside the presence of a court or tribunal.

¹ Adapted with the consent of the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996

Scheduling Matters:

8. We will endeavor to schedule dates for trials, hearings, depositions, meetings, negotiations, conferences, vacations, seminars, and other functions to avoid creating calendar conflicts for other participants in the legal process, provided our clients' interests will not be adversely affected.

9. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences need to be canceled or postponed. Early notice avoids unnecessary travel and expense and may enable the court and the other participants in the legal process to use the previously reserved time for other matters.

10. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' interests will not be adversely affected.

11. We will not request an extension of time for the purpose of unjustified delay.

PRINCIPLES PARTICULARLY APPLICABLE TO LITIGATION**Procedural Agreements:**

12. We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as requests for extensions of time, discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to the court.

13. We accept primary responsibility, after consultation with the client, for making decisions about procedural agreements. We will explain to our clients that cooperation between counsel in such matters is the professional norm and may be in the client's interest. We will explain the nature of the matter at issue in any such proposed agreements and explain how such agreements do not compromise the client's interests.

Discovery:

14. We will not use any form of discovery or discovery scheduling to harass, create unjustified delay, increase litigation expenses, or for any other improper purpose.

15. We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings, discovery requests, and objections.

16. We will not engage in any conduct during a deposition that would not be appropriate if a judge were present. Accordingly, we will not obstruct questioning during a deposition or object to deposition questions, unless permitted by the applicable rules to preserve an objection or privilege,

and we will ask only those questions we reasonably believe are appropriate in discovery under the applicable rules.

17. We will carefully craft document production requests so they are limited to those documents we reasonably believe are appropriate under the applicable rules. We will not design production requests for the purpose of placing an undue burden or expense on a party.

18. We will respond to document requests reasonably and in accordance with what the applicable rules require. We will not interpret a request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

19. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are appropriate under the applicable rules, and we will not design them for the purpose of placing an undue burden or expense on a party.

20. We will respond to interrogatories reasonably and in accordance with what the applicable rules require. We will not interpret interrogatories in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

21. We will base our discovery objections on a good faith belief in their merit. We will not object solely for the purpose of withholding or delaying the disclosure of properly discoverable information.

22. During discovery, we will not engage in acrimonious conversations or exchanges with opposing counsel, parties, or witnesses. We will advise our clients to conduct themselves in accordance with these provisions. We will not engage in undignified or discourteous conduct that degrades the legal proceeding.

Sanctions:

23. We will not seek court sanctions or disqualification of counsel unless reasonably justified by the circumstances determined after conducting a reasonable investigation, which includes attempting to confer with opposing counsel.

Lawyers' Duties to the Court:

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court to any tribunal, we shall use language that is respectful of courts or tribunals, the system of justice, and the symbolism that these represent.

25. We will not engage in conduct that offends the dignity or decorum of judicial or administrative proceedings, brings disorder or disruption to the courtroom or tribunal, or undermines the image of the legal profession.

26. We will advise clients and witnesses to act civilly and respectfully toward the court, educate them about proper courtroom decorum, and, to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

27. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities and will immediately make any clarifications and corrections as these become known to us.

28. We will not degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

29. We will act and speak civilly and respectfully to the judge's staff, the courtroom and tribunal staff, and other court or tribunal personnel, with an awareness that they, too, are an integral part of the judicial system. We will also advise clients and witnesses to act civilly and respectfully toward these participants in the legal process.

30. We recognize that judicial resources are scarce, that court dockets are crowded, and that justice is undermined when cases are delayed and/or disputes remain unresolved. Therefore, we will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

31. We recognize that tardiness and neglect show disrespect to the court and the judicial system. Therefore, we will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time and proceed efficiently. We will also educate clients and witnesses concerning the need to be punctual and prepared. If delayed, we will promptly notify the court and counsel, if at all possible.

32. Before dates for hearings or trials are set, or, if that is not feasible, immediately after such a date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

33. We will avoid ex parte communications with the court or tribunal, including the judge's staff, on pending matters, in person (whether in social, professional, or other contexts), by telephone, or in letters or other forms of written communication, unless such communications relate solely to scheduling or other non-substantive administrative matters, or are made with the consent of all parties, or are otherwise expressly authorized by law or court rule.

Judges' Duties to Lawyers and Others:

34. We will be courteous, respectful, and civil to lawyers, parties, agency personnel, and witnesses. We will maintain control of the proceedings, recognizing that we have both the

obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.

35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.

36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.

37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, witnesses, and of other courts. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

38. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. We will make all reasonable efforts to decide promptly any matters presented to us for decision.

39. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom, or the causes which, a lawyer represents.

41. We will do our best to ensure that court personnel act civilly towards lawyers, parties, and witnesses.

42. At an appropriate time and in an appropriate manner, we will bring to a lawyer's attention conduct which we observe that is inconsistent with these standards.

Judges' Duties to Each Other:

43. We will treat other judges with courtesy and respect.

44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.

45. We will endeavor to work cooperatively with other judges with respect to the availability of lawyers, witnesses, parties, and court resources.

OTHER GENERAL PRINCIPLES

46. We will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations, and will immediately make any clarifications and corrections as these become known to us.

47. We will not engage in personal vilification or other abusive or discourteous conduct in negotiations. We will not engage in acrimonious exchanges with opposing counsel or parties at the negotiating table. We will encourage our clients to conduct themselves in accordance with these principles.

48. We will honor all understandings with, and commitments we have made to, other lawyers. We will stand by proposals we have made in negotiations, unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them, and we will encourage our clients to conduct themselves in accordance with this principle.

49. We will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. We will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.

50. In memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely. In drafting proposed agreements based on letters of intent, we will strive to draft documents that fairly reflect the agreements of the parties.

Attachment 4

SUPPLEMENTAL RULES OF PROFESSIONAL CONDUCT FOR AIR FORCE RESERVE JUDGE ADVOCATES

A. Introduction. Government service is a public trust which requires placing loyalty to country, ethical principles, and the law above private gain and other interests. Practices that may be accepted in the private sector are not necessarily acceptable for reserve judge advocates. The purpose of these standards is to identify proscribed conduct that constitutes a conflict of interest. These standards supplement other ethical and professional guidance applicable to reserve judge advocates. Complaints involving these rules will be processed pursuant to paragraphs 4 and 5 of this instruction.

B. Rules.

Rule 1. REPRESENTATION ADVERSE TO THE AIR FORCE

A reserve judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the Air Force unless the Air Force first consents in writing.

DISCUSSION

The principle underlying this rule is that the Air Force is a reserve judge advocate's client. The rule ensures that the Air Force will be accorded the same protections that state rules of professional responsibility generally afford all clients. The rule also emphasizes the high ethical obligations of attorneys to protect the interests of the Air Force. It is based on *ABA Model Rules of Professional Conduct* Rule 1.7, which bars representation of a client which is adverse to another client unless each client consents. The rule does not establish a new definition of conflict of interest; rather, it identifies an area of potential conflicts and establishes a mechanism to avoid them.

Consent will be granted unless the proposed representation would create a conflict of interest with respect to Air Force duties actually performed by the reserve judge advocate. Notwithstanding this rule, the SJA may not grant consent where a statutory bar to representation has been imposed. See, e.g., 18 U.S.C. Section 207. Compliance with the consent procedures under this rule does not relieve the reserve judge advocate of his or her obligation to obtain the consent of the other client. See Part D for consent procedures.

EXAMPLES

(1) A reserve judge advocate attached for training to base X is asked to serve as civilian counsel by a military member in a court-martial at base X. The reserve judge advocate must obtain the consent of the SJA at base X. Consent will be granted by the SJA unless an actual conflict of interest is present. Air Force interests are served by allowing military members to be represented by counsel of their choice. The same result obtains with respect to representation in administrative proceedings.

(2) A reserve judge advocate attached for training to base X and retained as counsel in a tort action arising at base Y is required by this rule to obtain the consent of the SJA at base X. Consent will be granted unless an actual conflict of interest is present.

(3) A reserve judge advocate attached for training to base X and retained as counsel in a tort action arising at base X is required by this rule to obtain the consent of the SJA at base X. Consent should be granted unless circumstances exist which manifest an actual conflict of interest. In determining whether to grant consent, the SJA should consider the reserve judge advocate's actual involvement with the claims section. Organizational size, structure, and procedures, as well as the reserve judge advocate's geographic separation, should be evaluated to determine if he or she is sufficiently isolated to prevent either formal or casual involvement in the processing of the claim or access to privileged information concerning the claim.

Rule 2. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF THE AIR FORCE

Except as law may otherwise expressly permit, a reserve judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the reserve judge advocate participated personally and substantially on behalf of the Air Force. If a firm with which the reserve judge advocate is associated undertakes or continues representation after his or her disqualification under this rule, the reserve judge advocate shall:

a. advise the firm of the possible applicability of Rule 1.11, *Special Conflicts of Interest for Former and Current Government Officers and Employees* or analogous provision of the applicable jurisdiction; and

b. give prompt written notice to the Air Force, through the SJA, of the firm's participation in the matter, with sufficient information regarding the reserve judge advocate's role to enable the Air Force to ascertain compliance with this rule.

DISCUSSION

This rule is intended to avoid conflicts of interest between the reserve judge advocate's military and civilian positions where he or she previously represented the Air Force. The restriction applies only to those areas in which the reserve judge advocate participated personally and substantially. The term "personally and substantially" has the same meaning under this rule as it has under 18 U.S.C. Section 207.

Rule 3. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT

A reserve judge advocate shall not, in the performance of his or her official duties or while in duty status, participate in a matter in which he or she participated personally and substantially in his or her civilian capacity.

Rule 4. USE OF NONPUBLIC GOVERNMENT INFORMATION IN REPRESENTATION

A reserve judge advocate, having acquired information through his or her association with the Air Force which, could not have been known to the reserve judge advocate but for that association, shall not, in his or her civilian capacity, represent a client in a matter in which the information so acquired could be used to the material disadvantage of the Air Force or its employees, officers, contractors, or agents; nor shall he or she make any unauthorized disclosure of such information.

DISCUSSION

Regardless of whether an attorney-client relationship exists between a reserve judge advocate and the Air Force, every reserve judge advocate is provided access to information to which he or she could not otherwise have had access. This information may take many forms, including knowledge of specific facts, the existence of documents, the identity of personnel with specific knowledge, negotiation strategies or tactics, or views, opinions, or risk assessments of key Air Force personnel with respect to the particular case involved. It is acknowledged that a reserve judge advocate is permitted to utilize his or her knowledge of procedures relating to the Air Force. It is nonpublic factual information only which may impact upon the reserve judge advocate under this Rule. Reserve judge advocates representing clients in matters where such information can be used adversely to the interests of the Air Force have conflicting interests. Representation is precluded by the reserve judge advocate unless the written consent of all appropriately concerned parties has been obtained.

Rule 5. ADVERTISING

A reserve judge advocate shall not advertise his or her affiliation as a reserve judge advocate or attachment to a particular active or reserve unit or base. Inclusion of a reserve judge advocate's military status or affiliation in commercial sources is limited to rank and service component only.

DISCUSSION

Consistent with the JER, this rule does not prohibit the inclusion of reserve military grade and service component (e.g., "Captain, USAFR") in advertising or on business cards or stationery. In addition, the rule does not prohibit a simple statement of affiliation with the Air Force Judge Advocate General's Corps Reserve (TJAGCR) in biographical material, such as a resume, professional directory, or law firm home page on the Internet.

The reserve judge advocate's client is the Air Force and therefore the reserve attorney must not trade on his or her status as a judge advocate. The reserve judge advocate must avoid advertising his or her active affiliation with the TJAGCR because doing so might give the appearance that the reserve judge advocate is using his or her public office for private gain. Such an appearance would undermine public confidence in the integrity and professionalism of TJAGCR. In addition, the reserve judge advocate's special relationship with AFJAGC is such

that to allow that status to be carried in advertising could create an impression of favoritism by, or influence with, the Air Force. There also exists the potential that advertising such affiliation could lead to the impression that the Air Force endorses or otherwise sponsors the reserve judge advocate in his or her private business.

Rule 6. PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS

A reserve judge advocate shall not, while in active or inactive duty status, conduct private business during duty hours.

DISCUSSION

It is expected that SJAs will administer this rule reasonably and that a *de minimis* exception will be appropriately applied. The rule is not intended to preclude an occasional brief telephone call concerning appointments or the docketing of cases; nor is it intended to preclude the conduct of private business during off-duty hours. It is intended to preclude such activities as interviewing clients, conducting legal research, and drafting briefs during duty hours.

Rule 7. REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES

A reserve judge advocate shall not, for compensation, represent any individual, partnership, or corporation in connection with a matter where the initial contact with the individual with respect to such matter was as a judge advocate.

DISCUSSION

This rule is intended to preclude a reserve judge advocate from taking inappropriate advantage of his or her position. It bars representation when the initial contact occurred while the reserve judge advocate was acting in an official capacity, such as in providing legal assistance pursuant to AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, or investigating a claim. It is not intended to restrict representation so long as the initial contact was not made pursuant to the performance of the reserve judge advocate's official duties.

EXAMPLES

(1) A reserve judge advocate performing legal assistance interviews a client requesting a will. The client's estate requires more than the simple will provided by the legal office. The reserve judge advocate counsels the client regarding the need for specialized estate planning. He or she may not solicit the client's business for himself or herself or his or her firm in this matter. Furthermore, neither the reserve judge advocate nor the firm may accept this individual as a fee-paying client in this matter.

(2) Under the same set of facts as above, the same client later contacts the reserve judge advocate in his or her civilian capacity on an unrelated matter, such as the defense of a traffic violation. The reserve judge advocate may accept this client, but only with respect to the

unrelated matter (i.e., the traffic violation). Disclosure to the base SJA and discussion of potential problems is encouraged in all cases in which a client has previously been seen by the reserve judge advocate while serving as a judge advocate.

(3) A reserve judge advocate performing legal assistance counsels a client regarding an adoption. Completing the adoption process is beyond the scope of legal assistance. The reserve judge advocate may, however, in his or her civilian capacity, represent the client in this matter without fee. It is permissible for the client to pay court and other processing costs.

(4) While on duty, a reserve judge advocate is contacted by a military member concerning a private matter not covered by the legal assistance program. The reserve judge advocate may accept this client provided the initial contact with respect to the matter did not occur while the reserve judge advocate was: (a) providing legal assistance pursuant to AFI 51-504, or (b) responsible for taking official action on the matter for which representation is sought.

A reserve judge advocate may be asked to represent, in a private capacity, a member of the unit or organization to which the reserve judge advocate is assigned or attached. Such representation is not prohibited by this rule. However, before undertaking representation, the reserve judge advocate should consider all of the surrounding facts and circumstances.

A reserve judge advocate should use good judgment to avoid situations where the private representation of a member of the unit or organization may cause others in the unit or organization to perceive that the member will receive favorable treatment with respect to official matters. A reserve judge advocate should also avoid private representations that may preclude the effective discharge of his or her official duties, such as advising a commander on official matters affecting the member with whom there is a private attorney-client relationship.

Rule 8. SOLICITATION OF CLIENTS

A reserve judge advocate shall not solicit clients for himself or herself or his or her firm while in duty status or while in uniform; nor shall a reserve judge advocate solicit clients on military installations (other than through advertising permitted under Rule 5).

DISCUSSION

This rule is intended to preclude a reserve judge advocate from trading upon his or her status. It does not prohibit representation where the client initiated the request for legal services. As used in this rule, the term "client" includes "customer" as that term relates to a reserve judge advocate's business.

C. Definitions.

Representation. As used herein, this term encompasses acting on behalf of a client (including a corporation or government agency) not only as an advocate in formal judicial or administrative proceedings, but also in such activities as advising, counseling, or negotiating in connection with such matters as contracts, claims, or other controversies.

Staff Judge Advocate. This term refers to the SJA or civilian office chief of the reserve judge advocate's office of assignment or attachment for training, whether for inactive duty, annual training, or both. For purposes of these standards, HQ USAF and AFLOA directors and division chiefs shall be deemed to be SJAs. Judge advocates who exercise authority over discrete organizations (e.g., the Commandant of the Air Force Judge Advocate General School) shall be deemed SJAs for the purpose of these rules. In the case of Category A reserve judge advocates serving as SJAs, the SJA at HQ AFRC shall be deemed to be the SJA.

D. Requests for Consent.

(1) Where a reserve judge advocate seeks consent under Rule 1, he or she shall apply in writing, setting forth all relevant facts which are not privileged or protected from disclosure by law or by an ethical standard which is binding upon the reserve judge advocate. Consent may be requested and obtained orally in exigent circumstances when the relevant facts are clear and obtaining prior written consent is not practicable. In such cases, the reserve judge advocate shall apply for consent in writing within 5 working days. A request for consent shall be directed to the SJA of the office of assignment. In the case of Category A reserve judge advocates serving as SJAs, requests for consent shall be directed to the SJA, HQ AFRC. When granted, consent shall be deemed to be effective as of the date the representation began. If consent is denied, the reserve judge advocate will withdraw from the representation.

(2) SJAs are delegated the authority to grant consent on behalf of the Air Force. The acting SJA is authorized to grant consent in the absence of the SJA. Consent will be granted or denied within three working days of receipt of the request.

(3) If consent is denied, the reserve judge advocate may request reconsideration at the MAJCOM level. If consent is again denied, the reserve judge advocate may request reconsideration by the Mobilization Assistant to TJAG, and then TJAG, as appropriate. Reconsideration will be completed at each level within three working days of receipt.

(4) SJAs will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of each consent or denial will be provided to the reserve judge advocate, and an information copy of each request and the corresponding consent or denial shall be forwarded to the MAJCOM SJA. The SJA may file a copy of the consent in the applicable case, claim, or other file.

(5) Renewable consents for not longer than one year may be granted as to a class of matters.

(6) Consent authority may be exercised by SJAs to establish working arrangements with reserve judge advocates that protect the Air Force's interests while avoiding unnecessary restrictions upon reserve judge advocates' civilian activities. Tailored consent arrangements can take into account the relationship between a reserve judge advocate's military duties and the matter(s) for which consent is sought. Consideration may also be given to the structure and physical layout of the SJA's organization, the missions of organizations which are provided legal

services, the sensitivity of the matters involved, the specifics of the relationship of the reserve judge advocate to his or her firm, and the degree to which the reserve judge advocate has in the past cooperated in matters of proper conduct and ethics. When a class consent is involved, consideration may be given to the frequency with which matters within the class arise, the precision with which the class is described, and the impact of denial of class consent on the affected reserve judge advocate's private practice.

Attachment 5**SUPPLEMENTAL RULES OF PROFESSIONAL CONDUCT FOR AIR NATIONAL
GUARD JUDGE ADVOCATES**

A. Introduction. Government service is a public trust which requires placing loyalty to country, ethical principles, and the law above private gain and other interests. Practices that may be accepted in the private sector are not necessarily acceptable for Air National Guard (ANG) judge advocates. The purpose of these rules is to identify proscribed conduct that constitutes a conflict of interest. These rules supplement other ethical and professional guidance applicable to ANG judge advocates. They apply at all times when an ANG judge advocate is not serving in a Title 10 status. Complaints involving these rules will be processed pursuant to paragraphs 4 and 5 of this instruction.

B. Rules.**Rule 1. STATE ETHICS RULES AND GUIDELINES**

In addition to the Air Force rules and standards, an ANG judge advocate is bound by the ethics rules and guidance of each state where admitted to practice and of the state of permanent military assignment. In the event of a conflict between these *Rules* and state ethics rules, the more restrictive of the two shall govern. If performing duty in a state only status (as opposed to duty under Title 10 or Title 32), then the state rules govern.

Rule 2. APPEARANCE OF IMPROPRIETY

An ANG judge advocate should avoid conduct which may not involve an actual conflict of interest, but which may give an appearance of improper representation of adverse interests, and which may have a negative impact on the reputation of the Air Force, ANG, or state military department.

**Rule 3. REPRESENTATION ADVERSE TO THE AIR FORCE OR STATE MILITARY
DEPARTMENT**

An ANG judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the Air Force or state military department unless the Air Force or state military department first consents in writing.

DISCUSSION

The purpose of Rule 3 is to emphasize the high ethical obligations of attorneys and to protect the interests of the Air Force and the state. Rule 1.7 of the *ABA Model Rules of Professional Conduct* bars representation of a client which is adverse to another client unless each client consents. Rule 3 does not establish a new definition of conflict of interest. Normally, an ANG judge advocate may represent the Air Force, the state military department, or personnel assigned thereto, in an action against another military service, the Department of Defense, or a department of the state other than the military department of the state. State ethics rules may

preclude an ANG judge advocate or another attorney affiliated with his or her law firm from representing an Army National Guard member against the military department of the state.

Consent will be granted unless the proposed representation would create a conflict of interest with respect to the Air Force or state military department duties actually performed by the ANG judge advocate. Notwithstanding this rule, consent may not be granted where a statutory bar to representation has been imposed. See, e.g., 18 U.S.C. § 207. Compliance with consent procedures under this rule does not relieve the ANG judge advocate of his or her obligation to obtain the consent of the other client. See Part D for consent procedures.

EXAMPLES

(1) An ANG judge advocate is asked to serve as a civilian counsel by a military member in a court-martial at an active duty Air Force base. Where the ANG judge advocate has had no prior involvement in the investigation or processing of the case, there is no conflict of interest. Air Force interests are served by allowing military members to be represented by counsel of their choice. The same result obtains with respect to representation in administrative proceedings.

(2) An ANG judge advocate is asked to serve as civilian counsel by an Army National Guard (ARNG) technician (Army National Guard technician or Army National Guardsman) in a neighboring state regarding an adverse personnel action. Where the ANG judge advocate has no prior involvement in the investigation or processing of the case in the neighboring state, there is no conflict of interest.

(3) An ANG judge advocate is asked to serve as civilian counsel by an ANG or ARNG technician in the ANG judge advocate's state of military assignment regarding an adverse personnel action. Even where the ANG judge advocate has had no prior involvement in the investigation or processing of the case, there is a conflict of interest. Representation is precluded by both the ANG judge advocate and any other attorney in his or her affiliated law firm unless both the state military department and the technician consent.

(4) An ANG judge advocate is retained as civilian counsel in a tort action arising at an active duty Air Force base. Where the ANG judge advocate has had no prior involvement in the matter, there is no conflict of interest.

Rule 4. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF THE AIR FORCE OR THE STATE MILITARY DEPARTMENT

Except as applicable law or state ethical rules may otherwise permit, an ANG judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the ANG judge advocate participated personally and substantially on behalf of the Air Force or the state military department. If a firm with which the ANG judge advocate is associated undertakes or continues representation after his or her disqualification under this rule, the ANG judge advocate shall:

a. advise the firm of the possibility of the applicability of Rule 1.11, *Special Conflicts of Interest for Former and Current Government Officers and Employees*, or analogous provision of the applicable jurisdiction; and

b. give prompt written notice to the Air Force, through the SJA, of the firm's participation in the matter, with sufficient information regarding the ANG judge advocate's role to enable the Air Force to ascertain compliance with this rule.

DISCUSSION

The purpose of Rule 4 is to emphasize the avoidance of conflicts of interest between the ANG judge advocate's military and civilian positions where the ANG judge advocate previously represented the Air Force or the state military department. Rule 4 applies only to those areas in which the ANG judge advocate participated "personally and substantially." The term "personally and substantially" has the same meaning under this Rule as it has under 18 U.S.C. Section 207. Each case should be carefully evaluated on its own merits. For example, an ANG judge advocate assigned to a flying unit might not have participated "personally and substantially" on behalf of the state military department; that degree of participation might have been limited to an ANG judge advocate assigned to state headquarters.

EXAMPLE

Representing the military department, an ANG judge advocate testifies in favor of a bill extending private sector employment benefits to National Guardsmen. The ANG judge advocate and his or her affiliated law firm would be precluded from representing a private employer attempting to circumvent the force of that statute. However, neither the ANG judge advocate nor his or her affiliated law firm would be precluded from representing a private client attempting to circumvent or contest a different state statute.

Rule 5. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT

An ANG judge advocate shall not, in the performance of official duties or while in a duty status, participate in a matter in which the ANG judge advocate previously participated personally and substantially in his or her civilian capacity.

DISCUSSION

Absent a conflict, nothing precludes the ANG judge advocate from representing the Air Force or the state military department, or from giving either the benefit of the ANG judge advocate's familiarity with a question of law or the history of a particular statute, where such knowledge was derived from his or her general experiences as a civilian attorney.

EXAMPLE

An ANG judge advocate, while serving a civilian client in connection with a land development project, acquires an expertise in state legislation aimed at preserving the environment. Prior participation does not preclude his or her analysis of the legislation for the ANG commander.

Rule 6. PRIVATE USE OF NONPUBLIC GOVERNMENT INFORMATION

An ANG judge advocate, having acquired nonpublic information through his or her association with the Air Force or National Guard, which information could not have been known to the ANG judge advocate but for that association, shall not, in his or her civilian capacity, represent a client in a matter in which the information so acquired could be used to the material disadvantage of the Air Force, the National Guard, or any employee, officer, contractor, or agent of either; nor shall the ANG judge advocate make any unauthorized disclosure of such information.

DISCUSSION

Regardless of whether an attorney-client relationship exists between the ANG judge advocate and the Air Force or the ANG, every ANG judge advocate is provided access to nonpublic information which the ANG judge advocate could not have obtained otherwise. This information may take many forms, including knowledge of specific facts, the existence of documents, the identity of personnel with specific knowledge, negotiation strategies or tactics, or views, opinions, or risk assessments of key Air Force personnel with respect to the particular case involved. It is acknowledged that an ANG judge advocate is permitted to utilize his or her knowledge of procedures relating to the Air Force or National Guard. It is nonpublic factual information only which may impact upon the ANG judge advocate under this Rule. ANG judge advocates representing private clients in matters where such nonpublic information can be used are in a position of conflicting interests. Representation is precluded by the ANG judge advocate unless the written consent of all appropriately concerned parties has been obtained.

EXAMPLES

(1) An ANG judge advocate has a private case involving Air Force personnel as potential witnesses. During his annual training at an active duty Air Force base, he uses the Air Force Worldwide Locator to obtain current addresses for these witnesses. If this is in fact nonpublic information, the ANG judge advocate should not have used this resource for his private advantage. (Moreover, this raises the problem of his having performed private law work on government time. See Rule 8.)

(2) An ANG judge advocate is representing a spouse in a child custody dispute against a Guard member with whom he has had no previous professional contact. As a result of his military assignment, the ANG judge advocate learns that the Guard member has tested positive for cocaine. The ANG judge advocate has a conflict based upon his knowledge of this nonpublic information and should withdraw from representation of the spouse. Moreover, the ANG judge advocate should play no role in any adverse action against the Guard member which may impact adversely on the former client.

Rule 7. ADVERTISING

An ANG judge advocate shall not advertise his or her affiliation as an ANG judge advocate or assignment to a particular ANG unit. Inclusion of an ANG judge advocate's military status or affiliation in commercial sources is limited to rank and service component only.

DISCUSSION

Consistent with the JER, this rule does not prohibit the inclusion of ANG military grade and service component (e.g., "Captain, ANG") in advertising or on business cards or stationary. In addition, the rule does not prohibit a simple statement of reserve affiliation with AFJAGC in biographical material, such as a resume, professional directory, or law firm home page on the Internet.

An ANG judge advocate's client is the Air Force and ANG and therefore the ANG attorney must not trade on his or her status as a judge advocate. An ANG judge advocate must avoid advertising his or her affiliation with The Judge Advocate General's Corps Reserve (TJAGCR) because doing so might give the appearance that the ANG attorney is using his or her public office for private gain. Such an appearance would undermine public confidence in the integrity and professionalism of TJAGCR. In addition, the ANG judge advocate's special relationship with the TJAGCR is such that to allow that status to be carried in advertising could create an impression of favoritism by, or influence, with the Air Force or ANG. There also exists the potential that advertising such affiliation could lead to the impression that the Air Force or ANG endorses or otherwise sponsors the ANG judge advocate in his or her private business.

EXAMPLES

(1) An ANG judge advocate proposes to run an advertisement which includes the following statement:

"Military Lawyer, currently serving in the Maryland Air National Guard."

This advertisement violates the rule in that it inferentially indicates his or her affiliation as an ANG judge advocate.

(2) An ANG judge advocate proposes to run the following advertisement:

"Jane B. Green, Esq. Areas of practice include military justice and sports law. Member of the American, Maryland, and Federal Bar Associations and an officer in the Maryland Air National Guard."

This advertisement does not violate Rule 5. Generally, applicable federal ethics rules do not preclude members of reserve components, not on active duty, from using their military titles in connection with commercial enterprises if they indicate their reserve or retired status. However, state ethics rules may preclude an ANG judge advocate from indicating membership in the state military department.

(3) An ANG judge advocate who has been selected as a speaker at a Law Day program in the local community provides biographical material to the bar association's project officer. The biographical material includes not only information concerning his educational background and civilian practice, but also his past and present military service as an ANG judge advocate. This is not an advertisement and, therefore, does not violate Rule 5. The purpose of the biographical material is to describe the credentials of the speaker. The line between advertisement and biographical material, however, is not always clear. The same information in an unsolicited general distribution would violate Rule 8 because such an advertisement would trade on his military status.

Rule 8. PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS

An ANG judge advocate shall not, while on active duty or inactive duty status, conduct private business during duty hours.

DISCUSSION

It is expected that this guideline will be administered reasonably and that a *de minimis* exception will be appropriately applied. The Rule is not intended to preclude an occasional brief telephone call concerning appointments or the docketing of cases. However, it is intended to remind ANG judge advocates that they should not engage in activities such as interviewing clients, conducting legal research, drafting briefs and the like during duty hours.

Rule 9. SOLICITATION OF CLIENTS

An ANG judge advocate shall not solicit clients for his or her private practice or business while in duty status or while in uniform; nor shall an ANG judge advocate solicit clients on military installations (other than through advertising permitted under Rule 5).

DISCUSSION

This Rule is intended to preclude ANG judge advocates from trading upon the ANG judge advocate's military status. It does not prohibit representation or other dealings where the client initiated the request for legal or business services. As used in this rule, the term "client" includes "customer" as that term relates to an ANG judge advocate's business.

Rule 10. REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES

An ANG judge advocate shall not, for compensation, knowingly agree to represent a member of his or her state's military department in connection with a matter for which the individual has an entitlement to legal assistance.

DISCUSSION

This rule is intended to preclude ANG judge advocates from taking inappropriate advantage of their positions by accepting compensation for private work which could have been performed at no expense to a client within the legal assistance program or pursuant to military assignment.

EXAMPLES

(1) An ANG judge advocate is initially contacted at his or her private law firm by an ANG member concerning the preparation of a will for which there is an entitlement to free legal assistance through ANG resources. The ANG judge advocate may not take the case as a private attorney.

(2) An ANG judge advocate is initially contacted at his or her private law office by an ARNG member of his or her state seeking civilian representation in an ARNG court-martial. The ANG judge advocate may not take the case if he or she could be detailed as military counsel to defend the ARNG member under the state military code at no cost to the member.

Rule 11. POTENTIAL STATE/FEDERAL CONFLICT

An ANG judge advocate may represent both the state in which he or she serves as a member of the ANG and the Air Force when the state and federal interests coincide. In the event of divergent interests, the ANG judge advocate should represent his or her state when serving in a state only status. In other situations, the ANG judge advocate should seek supervisory guidance in defining who the client is regarding the particular matter.

C. Definitions.

Representation. As used herein, this term encompasses acting on behalf of a client (including a corporation or government agency) not only as an advocate in formal judicial or administrative proceedings, but also in such activities as advising, counseling, or negotiating in connection with such matters as contracts, claims, or other controversies.

Staff Judge Advocate or SJA. Judge advocates who serve as the SJA of a unit, wing, or group shall be deemed SJAs for the purpose of these rules.

D. Requests for Consent.

1. Where an ANG judge advocate seeks consent under Rule 3, the judge advocate shall apply in writing, setting forth all relevant facts which are not privileged or protected from disclosure by law or by an ethical standard which is binding on the ANG judge advocate. Consent may be requested and obtained orally in exigent circumstances when the relevant facts are clear and obtaining prior consent is not practicable. In such cases, the ANG judge advocate shall apply for consent within 5 working days. A request for consent shall be directed towards the ANG Joint or State Headquarters SJA concerning potential conflicts with the state military department. For conflicts concerning the Air Force, requests shall be directed to the SJA whose office has direct responsibility for the matter on behalf of the Air Force. When granted, consent

shall be deemed to be effective as of the date the representation began. If consent is denied, the ANG judge advocate will withdraw from the representation.

2. The SJAs are delegated the authority to grant consent on behalf of the Air Force. The acting SJA is authorized to grant consent in the absence of the SJA. Consent will be granted or denied within three working days of receipt of the request.

3. If consent is denied, the ANG judge advocate may request reconsideration. Requests for reconsideration for conflicts involving the Air Force will be directed to the SSA for the office that has direct responsibility for the matter on behalf of the Air Force. If the SSA denies the request, the ANG judge advocate may request reconsideration by The Judge Advocate General. Reconsideration at each level will be completed within three working days of receipt of the request.

4. SJAs will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of each consent or denial will be provided to the ANG judge advocate and an information copy of each request and the corresponding consent or denial shall be forwarded to the State Headquarters SJA or SSA as appropriate. The SJA may file a copy of the consent in the applicable case, claim, or other file.

5. Renewable consents for not longer than one year may be granted as to a class of matters.

6. Consent authority may be exercised by SJAs to establish working arrangements with ANG judge advocates that protect the Air Force's interests while avoiding unnecessary restrictions upon ANG judge advocates' civilian activities. Tailored consent arrangements can take into account the relationship between an ANG judge advocate's military duties and the matter(s) for which consent is sought. Consideration may also be given to the structure and physical layout of the SJA's organization, the missions of organizations which are provided legal services, the sensitivity of the matters involved, the specifics of the relationship of the ANG judge advocate to his or her firm, and the degree to which the ANG judge advocate has in the past cooperated in matters of proper conduct and ethics. When a class consent is involved, consideration may be given to the frequency with which matters within the class arise, the precision with which the class is described, and the impact of denial of class consent on the affected ANG judge advocate's private practice.

Attachment 6**SAMPLE LEGAL SERVICES CONFIDENTIALITY AGREEMENT**

The Volunteer Program is an integral part of the functioning of the legal office. Volunteer responsibilities may include, but are not limited to: answering telephone queries; scheduling appointments; typing and filing official correspondence; greeting and assisting legal assistance clients, claims customers, unit commanders, first sergeants, law enforcement personnel, and others; and other duties that may expose me to confidential information.

I understand that maintaining confidentiality is of critical importance in my work as a volunteer in the office. During my work, I may learn confidential information that is related to the military and legal work of attorneys, paralegals, or support personnel assigned to the office. Command, client, and customer information, from any source and in any form, is strictly confidential. This includes the mere fact that an individual has come to the legal office or was discussed by personnel in the office.

I agree that I will not violate the confidentiality interests of any person whose circumstances I become aware of in the course of my volunteer duties. I will presume that any information I learn in the office is confidential unless I am explicitly advised otherwise by the Law Office Superintendent or a judge advocate. If at any time I learn of confidential information in which I have a personal interest (e.g., information regarding a family member, friend, or neighbor), I will disclose that personal interest to either the Staff Judge Advocate or the Law Office Superintendent.

This agreement does not prevent me from discussing the general nature of my work as a volunteer, the general nature of the work of the office, or official matters that are known to the general public. However, in the course of discussing those matters, I understand that under no circumstances may I reveal confidential information.

If I have any questions about this agreement or about disclosing any specific information, I will consult with either the Staff Judge Advocate or the Law Office Superintendent.

I have read this agreement and agree to abide by its terms.

Law Office Superintendent

Volunteer